88-219

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

In The
Supreme Court of the United States

October Term, 1987

MANNHEIM BOOKS, INC., *Appellant,*

v.

THE COUNTY OF COOK, ILLINOIS, *Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

BOURGEOIS & NULL
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June 25, 1988

QUESTION PRESENTED

Whether the Cook County Zoning Ordinance regulating adult uses is violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to completely prohibit all adult book stores from locating in any commercial or residential zone while permitting such uses only in industrial zones.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the appellant, Mannheim Books, Inc.; the appellee, the County of Cook, Illinois; The Village of Franklin Park, Illinois (intervening plaintiff below); and the following defendants below (not participating in the instant appeal): Renaissance Arcade and Bookstore, Robert T. Syverson, June B. Syverson, Sam Cecola, Frank and Anita Panno; Torch Club, Inc., Nick Stevens; Roaring Twenties Bookstore; Smokers Health Club, Sam A. Cecola a/k/a Salvatore A. Cecola, Frank and Anita Panno; Jewel Ann Ciotti, and Melrose Park National Bank as Trustee t/u/t #2059 dated May 16, 1977; Taray, Inc., Willie Sille, Ronald Martin, Harold Turner, Peggy Jean Case, and Raymond Cisco.

The appellant has no partially or wholly owned subsidiaries, no parent corporation and no affiliates.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. _____

MANNHEIM BOOKS, INC., *Appellant,*

v.

THE COUNTY OF COOK, ILLINOIS, *Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

Mannheim Books, Inc., the appellant, appeals from the final judgment of the Supreme Court of Illinois, dated March 30, 1988, holding that the 1981 Cook County Zoning Ordinance is constitutional and is not violative of the appellant's right of free speech as guaranteed by the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois in *County of Cook v. Renaissance Arcade & Bookstore,* is reported at 122 Ill. 2d 123, 522 N.E.2d 73, 118 Ill. Dec. 618 (1988) and is reproduced in Appendix A.

The opinion of the Illinois Appellate Court, finding the Cook County Zoning Ordinance unconstitutional,

which the Illinois Supreme Court reversed, is reported at *County of Cook v. Renaissance Arcade & Bookstore,* 150 Ill. App. 3d 6, 501 N.E.2d 133, 103 Ill. Dec. 112 (1986) and is reproduced in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois, upholding the constitutionality of the Cook County Zoning Ordinance, was entered on March 30, 1988. A supplementary notice of appeal to this Court was duly filed in the Supreme Court of Illinois on June, 20, 1988. A copy of the notice of appeal is reproduced in Appendix C.

This appeal is being docketed in this Court within 90 days from the entry of the court's final judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL PROVISION

First Amendment, United States Constitution

Congress shall make no law ... abridging the freedom of speech...

RAISING THE FEDERAL QUESTION

At the earliest stage of the enforcement proceedings below in a motion to dismiss, the appellant raised the claim that the Cook County Zoning Ordinance was unconstitutional for repugnancy to the free speech

provisions of the First Amendment to the United States Constitution. The trial court denied the motion to dismiss, held a trial and subsequently granted an order enjoining the appellant from operating its business at its present location in violation of the Cook County Zoning Ordinance. The appellants filed a timely appeal to the Illinois Appellate Court contending that the ordinance offends the First and Fourteenth Amendments, unconstitutionally restricting access to information that is protected by the First Amendment. The Illinois Appellate Court found the appellant's arguments persuasive and overturned the trial court's decision. The appellees filed a petition for leave to appeal to the Illinois Supreme Court and the court granted this petition, reversing the Illinois Appellate Court and affirming the judgment of the trial court, the Circuit Court of Cook County. In doing so, the Illinois Supreme Court expressly considered and rejected the appellant's federal constitutional claim.

STATEMENT OF THE CASE

The appellant, Mannheim Books, Inc., is an adult bookstore which sells and displays sexually explicit but nonobscene adult books, magazines, video tapes and motion pictures. All the books, magazines, motion pictures and video tapes sold or displayed by the appellant are presumptively protected by the First Amendment to the United States Constitution. Appellant's business is located in unincorporated Cook County, Illinois. Appellee is the county government of Cook County, Illinois, a quasi-municipal corporation.

Appellees filed suit in March 1983 in Circuit Court of Cook County, seeking injunctions prohibiting the appellants from operating its businesses in violation of a

1981 Cook County Zoning Ordinance that allows specified adult uses to operate only in certain zoned areas.

The ordinance, adopted on December 7, 1981, and reproduced in Appendix D, provides in Section 6 that to prevent the concentration of adult uses from having an adverse effect upon adjacent and nearby residential and commercial areas, adult uses are permitted in 78 industrially zoned areas, referred to as I-2, I-3 and I-4 and as special uses in all 245 commercially zoned areas of C-3, C-4, C-6 and C-8. Special uses required the obtaining of a special use permit from the Appellee.

There are 1,225 I (industrial), C (commercial) and R (residential) zones in unincorporated areas of Cook County affected by the ordinance. The ordinance permits the location of adult uses as of right in only the 78 zones designated I-2, I-3 and I-4.

The Circuit Court of Cook County upheld the ordinance against the Appellant's First Amendment defense and enjoined Appellant from continuing to operate its business in a commercial zone in violation of the ordinance. On appellant's appeal, the Illinois Appellate Court struck down the ordinance as unconstitutional, stating that it violated the standards for such zoning regulation of adult businesses as set forth by the United States Supreme Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 481, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

Appellees appealed this decision to the Illinois Supreme Court. On March 30, 1988, that court struck

down as unconstitutional the section of the ordinance allowing the Appellee discretion to allow special uses in the 245 commercially zoned areas. The court affirmed the concept of restricting all adult uses to the 78 industrial zones. This construction by the highest court of the State of Illinois rendered the ordinance as enforced and applied a complete prohibition on all adult uses in 1147 of 1,225 zones (94%) of unincorporated Cook County while permitting such uses in only the 78 I, industrial zones.

THE QUESTION IS SUBSTANTIAL

The question as to the First Amendment implications of using a zoning regulation to complete prohibit all adult uses in residential and commercial areas and restrict them to possible operation only in obscure industrial zones where operation is extremely impractical is a novel and substantial one. It has never been treated before by this Court.

The seminal case in defining the degree to which nonobscene, adult businesses may be regulated is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), in which case this Court upheld a Detroit zoning ordinance against a constitutional attack. The Detroit Common Council sought to disperse the sites of adult theatres so that a concentration of these businesses would not create a "skid row" environment. To achieve this end, the ordinance provided that an adult theatre could not locate within 1,000 feet of any two "regulated uses" including adult bookstores, cabarets, bars, pool halls and similar establishments that are commonly associated with a "skid row" neighborhood. 427 U.S. 50, 52 n.3, 49 L. Ed. 2d 310, 316 n. 3, 96 S. Ct. 2440, 2444 n. 3.

A plurality of the *Young* court found that the Detroit ordinance did not operate as an impermissible restraint upon constitutionally protected speech. This was so, according to the plurality, because the ordinance did not substantially restrict public access to adult films. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62, 49 L. Ed. 2d 310, 321, 96 S. Ct. 2440, 2448. The result would have been different, according to the plurality, if the Detroit ordinance had substantially suppressed lawful speech or affected existing establishments. Since there were "myriad" locations in which new adult businesses could operate, however, the ordinance did not offend the constitution. 427 U.S. 60, 71 n. 34, 49 L. Ed. 2d 310, 326 n.34, 96 S. Ct. 2440, 2453 n.34.

Several years after the *Young* decision, the Court again considered the constitutionality of a zoning ordinance that curtailed free speech. In *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176, the Court struck down a municipal ordinance that prohibited all live entertainment within the city limits. According to the Court, when a zoning ordinance "infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." 452 U.S. 61, 68, 68 L. Ed. 2d 671, 686, 101 S. Ct. 2176, 2182-83.

Most recently, in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 481 (1986), this Court reaffirmed the power of municipalities to constitutionally utilize adult use zoning ordinances in a "content-neutral time, place and manner" regulation when its aim was not based on the *content* of the speech regulated, but on the *secondary effects* of that expression upon adjacent neighborhoods. Such regulation, this Court emphasized, is acceptable only so long as "they are designed to serve a substantial

governmental interest and do not unreasonably limit alternative avenues of communication."

As interpreted by the Illinois Supreme Court, the Cook County Zoning Ordinance completely bans all adult uses from the vast majority of unincorporated Cook County and restricts it to possible operation only in obscure industrial zones where operation is extremely impractical. The aim of such extreme restriction is not "content neutral" and is not merely a time, place and manner type of regulation. It objectively functions as an effective ban on and suppression of First Amendment protected speech.

The ordinance as construed does not allow reasonable alternative avenues of communication as required by this Court in *Renton*. In *Renton,* adult uses were not exiled to the industrial outback, rather they were permitted as of right in commercial zones insulated by distance from residential areas where their allegedly objectionable side effects were minimal and wherein they could freely disseminate their materials.

The restriction of adult uses to industrial zones is broader than necessary to prevent neighborhood blight. Banishing adult businesses to industrial zones does nothing to prevent their concentration, in fact it encourages it. Because the ordinance is not narrowly drawn, it directly impinges on First Amendment interests and is not a "content neutral" regulation.

The unincorporated industrial zones to which the ordinance would restrict adult uses are often bereft of necessary water or utility services. They are poorly lighted, relatively inaccessible and characterized by heavy industrial and agricultural uses, making the operation of a bookstore or movie arcade business both

commercially impractical and economically unfeasible thus denying "reasonable alternative avenues of communication." While a zoning ordinance need not provide commercially viable sites, this Court *Renton* it must still refrain from "effectively denying [...] a reasonable opportunity to open and operate an adult business." By definition, land zoned for industrial use is ill-suited for consumer-oriented enterprizes.

There are a myriad of cases in which the courts have addressed the use of zoning to regulate the location of adult businesses. In no case before this one has a court upheld as restrictive an ordinance attempting to limit adult businesses *only* to isolated industrial zones. An examination of these cases shows that, while reasonable zoning regulation of adult businesses is upheld, the complete prohibition of all adult businesses in all commercial districts has never been approved.

No other court has ever upheld an ordinance as restrictive of adult businesses before the recent Illinois Supreme Court decision. In *Basiardanes v. City of Galveston,* 682 (5th Cir. 1982), *Purple Onion, Inc., v. Jackson,* 511 F. Supp. 1207 (N.D. Ga. 1981) and *North Street Book Shoppe, Inc. v. Village of Endicott,* 582 F. Supp. 1428 (N.D.N.Y. 1984), courts condemned ordinances which unduly restricted adult uses. In *Basiardanes,* the court condemned an ordinance excluded adult uses from 80 to 90% of the three areas in which they were allowed to locate, virtually banning them altogether. In *North Street,* the court condemned an ordinance restricting adult uses to only two undesirable industrial locations.

In *Genusa v. Peoria,* 619 F.2d 1203 (7th Cir. 1980), the ordinance upheld only prohibited adult uses altogether from residential areas or within 700 feet and restricted

adult uses from locating within a specified number of feet of pre-existing schools. In *E & B Enterprises v. University Park,* 449 F. Supp. 695 (N.D.Tex. 1977), the court held invalid on First Amendment grounds a zoning ordinance that restricted adult uses to only two areas in the city--neither of which was available, since one was already occupied commercially and the other was owned by the city. And, in *Bayside Enterprises, Inc. v. Carson,* 450 F. Supp. 696 (M.D. Fla. 1978), the court struck down an ordinance prohibiting adult uses within 2,500 feet of residential zones.

See also *Ellwest Stereo Theatres, Inc. v. Byrd,* 472 F. Supp. 702 (N.D. Tex. 1979) (ordinance invalid); *Bayou Landing Ltd. v. Watts,* 563 F.2d 1172, *cert. denied,* 439 U.S. 818, 58 L. Ed. 2d 109, 99 S. Ct. 79 (5th Cir. 1977) (ordinance invalid when directed against sole adult business in city rather than establishing rule of general application); *Stansberry v. Holmes,* 613 F.2d 1285 (5th Cir.), *cert. denied,* 449 U.S. 885, 66 L. Ed. 2d 112, 101 S. Ct. 240 (1980), (ordinance restricting adult uses to 1,500 feet from certain uses, such as schools, homes or hospitals, upheld); *Avalon Cinema Corp. v. Thompson,* 661 F.2d 659 (8th Cir. 1981), (ordinance as applied impermissible content-based regulation when prohibiting adult theaters from locating with 100 yards of park, school, residential area or church); *Lydo Enterprises Inc. v. Las Vegas,* 745 F.2d 1211 (9th Cir. 1984), (upholding ordinance restricting adult uses to 1,000 feet of each other and excluding them from 1,000 feet of schools); *754 Orange Ave., Inc. v. West Haven,* 761 F.2d 105 (2d Cir. 1985), (enjoining enforcement of ordinance restricting adult uses to 1500 feet away from schools, parks and playgrounds); *Ebel v. Corona,* 767 F.2d 635 (9th Cir. 1985), (ordinance restricting adult uses to only two commercial zones was unconstitutional as applied); *Shangri-La Enterprises Ltd. v. Brennan,* 483 F. Supp. 281

(E.D. Wis. 1980), (upholding ordinance restricting adult uses to 1,000 feet of each other); *CLR Corp. v. Henline,* 702 F.2d 637 (6th Cir. 1983), (ordinance unconstitutional which restricted adult uses to more than 500 feet from any residence and limited such uses to sites with a total of 2,500 feet of frontage within one and one half miles of western city limits); *Alexander v. Minneapolis,* 698 F.2d 936 (8th Cir. 1983), (ordinance unconstitutional as applied which restricted adult uses to 500 feet from residential zones); *15192 Thirteen Mile Rd. v. Warren,* 593 F. Supp. 147 (E.D. Mich. 1984), (ordinance upheld which allowed adult uses in the general business district of the city, as well as in industrial areas); *815 Foxon Rd. Inc. v. East Haven,* 605 F. Supp. 1511 (D. Conn. 1985), (ordinance unconstitutional which restricted adult theaters to one of five commercial zones and required them to be more than 200 feet from residential areas); *Patel & Patel v. South San Francisco,* 606 F. Supp. 666f (N.D. Cal. 1985), (zoning ordinance restricting motels showing adult films in room unconstitutional); *International Food & Beverage Systems v. Ft. Launderdale,* 614 F. Supp. 1517 (S.D. Fla. 1985), (ordinance which restricted establishments selling alcohol and permitting nudity to 750 feet of residential property was invalid as not least restrictive means); *S & G News, Inc. v. Southgate,* 638 F. Supp. 1060 (E.D. Mich. 1986), (ordinance restricting adult uses to certain commercial zones upheld); *Amico v. New Castle County,* 101 F.R.D. (D. Del. 1984), *affirmed without opinion,* 770 F.2d 1066 (3d Cir. 1985), (ordinance restricting adult uses to 2800 feet away from schools upheld); *Book Cellar Inc. v. Phoenix,* 150 Ariz. 42, 721 P.2d 1169 (1986), (ordinance upheld restricting adult uses to 500 feet from residences); *Walnut Properties, Inc. v. City Council of Long Beach,* 100 Cal. App. 3d 1018, 161 Cal. Rptr. 411, *cert. denied,* 449 U.S. 836, 66 L. Ed. 2d 42, 101 S. Ct. 109 (1980), (upholding ordinance restricting adult uses to 500

feet from residences); *Castner v. City of Oakland,* 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (1982), (upholding ordinance restricting adult uses to 1000 feet from residential zones); *Strand Property Corp. v. Municipal Court,* 148 Cal. App. 3d 882, 200 Cal. Rptr. 47 (1983), (upholding ordinance restricting adult uses to 1000 feet of residences); *City of Whittier v. Walnut Properties, Inc.,* 149 Ca. App. 3d 639, 197 Cal. Rptr. 127 (1983), (upholding ordinance that allowed adult uses in certain commercial and industrial zones but required that they be a given distance from residential zones); *City of Vallejo v. Adult Books,* 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143 (1985), *cert. denied,* 89 L. Ed. 2d 601, 106 S. Ct. 1374 (1986), (upholding ordinance limiting adult businesses to certain commercial districts, shopping districts and "intensive use" districts as well as to 500 feet away from residential areas); *Marco Lounge, Inc. v. Federal Heights,* 625 P.2d 982 (Colo. 1981), (zoning ordinance restricting adult uses to "E-1" zone was unconstitutional when there was no such zone in the city nor any assurance that such a zone would ever be created); *State v. Hudson,* 412 A.2d 1148 (Del. 1980), (regulation prohibiting adult bookstores in shopping centers with more than three retail stores upheld); *Dandy Co. v. Civil City of South Bend, County City Complex,* 401 N.E.2d 1380 (Ind. App. 1980), (ordinance constitutional that restricted adults uses to 500 feet from residential zones and 1,000 feet of other adult uses); *Texas Nat. Theatres, Inc. v. Albuquerque,* 92 N.M. 282, 639 P.2d 569 (1982), (ordinance restricting adult uses to 500 feet of residential zones upheld); *Harris Books Inc. v. Santa Fe,* 98 N.M. 235, 647 P.2d 868 (1982), (ordinance unconstitutionally vague which restricted adult bookstore or newsrack within 1,000 feet of certain other uses); *Kacar, Inc. v. Zoning Hearing Bd.,* 60 Pa. Cmwlth 582, 432 A.2d 310 (1981), (ordinance upheld restricting adult uses to 500 feet from schools, churches and residential zones);

Memet v. State, 642 S.W.2d 518 (Tex. App. 1982), (ordinance restricting adult uses to certain distances from other uses upheld); and *Olmos Realty Co. v. State,* 693 S.W.2d 711 (Tex. App. 1985), (ordinance restricting adult uses to 500 feet from residential zones upheld).

What *all* these cases have in common is simply this: none of them upheld an ordinance as restrictive as the Cook County Zoning Ordinance, prohibiting adult uses in *all* commercial zones, permitting them only in the industrial "outback." This presents a unique and substantial federal question. Because the Cook County Zoning Ordinance, as definitively construed by the Illinois Supreme Court, goes far beyond the regulation approved in *Renton*--or by any other court--in restricting the First Amendment rights of adult businesses, there is a substantial federal constitutional question which this Court should resolve.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,
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June 25, 1988

APPENDICES

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APPENDIX A

Opinion of the Supreme Court of Illinois Construing the Cook County Zoning Ordinance

THE COUNTY OF COOK, Appellant, v. RENAISSANCE ARCADE AND BOOKSTORE *et al.*, Appellees (The Village of Franklin Park, Intervening Appellant), 122 Ill. 2d 123, 522 N.E.2d 73, 118 Ill. Dec. 618 (March 30, 1980).

Docket No. 64750--Agenda 29--September 1987.

Supreme Court of Illinois.

Filed March 30, 1988.

JUSTICE MILLER delivered the opinion of the court:

Plaintiff, the County of Cook, filed separate complaints against defendants seeking to enjoin them from operating their respective businesses in violation of the Cook County Zoning Ordinance. The causes were consolidated and the trial court entered an order allowing the Village of Franklin Park to intervene in the cause as a party plaintiff. After defendants' motions to dismiss were denied, the consolidated causes were tried before a judge in the circuit court of Cook County. At the conclusion of the trial, the trial judge entered an order enjoining defendants from operating their businesses at their present locations in violation of the Cook County Zoning Ordinance. The defendants appealed, and the appellate court reversed (150 Ill. App. 3d 6). We granted the plaintiffs' petition for leave to appeal (107 Ill. 2d R. 315).

Plaintiffs filed suit in March 1983 seeking injunctions prohibiting the defendants from operating their businesses in violation of a 1981 Cook County zoning ordinance that allows specified adult uses to operate only in certain zoned areas. (1981 Ordinance Amending Certain Sections of the Cook County Zoning Ordinance of 1976) (1981 Ordinance).) After a trial, the trial judge found that the ordinance reasonably regulates and restricts the location of adult uses, and entered an order enjoining the defendants from operating their adult use businesses at their present locations in violation of the ordinance.

The 1981 ordinance follows a 1977 ordinance (An Ordinance Amending the County Zoning Ordinance (1977 Ordinance), portions of which were held unconstitutional in *County of Cook v. World Wide News Agency* (1981), 98 Ill. App. 3d 1094. The 1981 Ordinance seeks to regulate adult uses in unincorporated Cook County (defined as adult bookstores, adult entertainment cabarets, adult mini motion picture theaters and adult motion picture theaters (Cook County Zoning Ordinance Sec. 14.2 (1981))), by establishing them as permitted uses in "all 78 industrially zoned areas of 1-2, 1-3 and 1-4 and as special uses in all the 245 commercially zoned areas of C-3, C-4, C-6 and C-8" (Cook County Zoning Ordinance Sec. 13.16-1 (1981)). Not more than two adult uses are permitted to be established within 1,000 feet of each other in a commercial zone. (Cook County Zoning Ordinance Sec. 13.16-1 (1981)). To secure a special use application to operate in a commercial zone requires a public hearing before the zoning board of appeals and a decision by the board of commissioners. (Cook County Zoning Ordinances Secs. 13-17, 13-10 (1981). The 1,000-foot restriction in commercial zones may be waived if certain requirements are met. Cook County Zoning Ordinance Sec. 13.16-2 (1981).

The 1981 Ordinance also provides for the amortization of nonconforming, preexisting adult use establishments. Nonconforming uses are automatically given six months to amortize their businesses, and an additional six months is given to any business which applies for a certificate of nonconformance. (Cook County Zoning Ordinance Secs. 13.16-4-1 through 13.16-4-5 (1981).) Nonconforming uses may apply for an amortization period longer than one year. Cook County Zoning Ordinance Sec. 13.16-4-4 (1981).

On appeal from the trial court's order granting the injunction, the appellate court reversed, holding that the 1981 Ordinance unconstitutionally restricted the defendants' first amendment rights. Applying a *de novo* standard of review, which it felt was mandated by *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949, the court stated that he ordinance "signifantly impedes public access to adult uses," in violation of *Young v. American Mini Theaters, Inc.* (1976), 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440. (150 Ill. App. 3d at 15.) The court hten held that the ordinance, by permitting adult uses to locate, as of right, only in industrially zoned areas, was unconstitutionally overly broad. The court further stated that the ordinance failed to satisfy the constitutional requirements for adult use zoning ordinances established in *City of Renton v. Playtime Theatres, Inc.* (1986), 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925. The court held that by relegating adult uses to industrial zones "the county has not left available a reasonable alternative avenue of communication." 150 Ill. App. 3d at 20.

The plaintiffs contend that the 1981 Ordinance provides adequate reasonable alternative channels for communicating sexually explicit materials to the public

and satisfies the constitutional standards set forth in *Renton*. The plaintiffs further argue that amortization of nonconforming uses does not unconstitutionally suppress speech nor does it limit the opportunities for sexually oriented businesses to open and operate. They allege that courts have been increasingly willing to sustain amortization clauses independently of first amendment interests and that the present amortization period provides a sufficient and reasonable amount of time for defendants to relocate. The plaintiffs also argue that two provisions in the 1977 Ordinance prohibiting adult uses from locating within 1,000 feet of each other (Cook County Zoning Ordinance Sec. 13.16-1 (1977) or within 1,000 feet of any area zoned for residential use or use by churches (Cook County Zoning Ordinance Sec. 13.16-4 (1977)) are not contained in the present ordinance and are now inapplicable due to the earlier appellate court case finding certain provisions of the 1977 Ordinance unconstitutional. *County of Cook v. World Wide News Agency* (1981), 98 Ill. App. 3d 1094.

The defendants contend that the ordinance is unconstitutional, under *Renton,* for failing to provide adult uses with a reasonable opportunity to operate by restricting them to industrial zones and by unconstitutionally reducing public access to first amendment protected communication. The defendants further argue that the lack of a grandfather clause exempting preexisting nonconforming adult uses unconstitutionally suppresses expression. Moreover, defendants contend, the amortization period permitted adult uses is unreasonably short. The defendants also allege that the 1,000-foot requirements contained in the predecessor 1977 Ordinance remain in force and apply to adult uses located in permitted industrial zones as well as special use commercial zones.

It is uncontested that cities and municipalities may regulate, through their zoning power, the location of sexually explicit businesses. In *Young v. American Mini Theatres, Inc.* (1976), 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440, the Supreme Court upheld the constitutionality of a Detroit zoning ordinance regulating the location of defined adult theatres by prohibiting them from locating within 1,000 feet of any two other regulated uses or within 500 feet of a residential area. A four-justice plurality found that the ordinance did not violate the first amendment as an impermissible prior restraint, noting that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." (427 U.S. at 71, 49 L. Ed. 2d at 327, 96 S. Ct. at 2453.) In his concurrence, Justice Powell focused on the interests of the city and the power to zone, noting that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government.' " (427 U.S. at 80, 49 L. Ed. 2d at 332, 96 S. Ct. at 2457; (Powell, J., concurring), quoting *Village of Belle Terre v. Baraas* (1973), 416 U.S. 1, 13, 39 L. Ed. 2d 797, 807, 94 S. Ct. 1536, 1543 (Marshall, J., dissenting).) Justice Powell analyzed the challenged ordinance under the four-part test of *United States v. O'Brien* (1968), 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673, and found that the ordinance was clearly based on a substantial governmental interest and implicated "First Amendment concerns only incidentally and to a limited extent." *Young,* 427 U.S. at 73, 49 L. Ed. 2d at 328, 96 S. Ct. at 2454.

In *Renton v. Playtime Theatres, Inc.* (1986), 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925, the Supreme Court again upheld the constitutionality of a city's zoning ordinance against a first amendment challenge. The challenged ordinance was designed to concentrate adult uses by prohibiting them from locating within 1,000 feet

of any residential zone, single- or multiple-family dwelling, church, park or school. Because the ordinacne did not ban adult theaters altogether, the court analyzed the *Renton* ordinance as a form of time, place and manner regulation. Content-neutral "time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." (475 U.S. at 47, 89 L. Ed. 2d at 37, 106 S. Ct. at 928.) The Renton ordinance, the Court stated, was aimed at the secondary effects of adult uses, and not at the content of the films shown, and was clearly based on a substantial interest in preventing crime, protecting retail trade and maintaining property values. The ordinance was also narrowly tailored to "affect only that category of theaters shown to produce the unwanted secondary effects." (475 U.S. at 52, 89 L. Ed. 2d at 41, 106 S. Ct. at 932.) In response to the theater owner's contention in *Renton* that the ordinance did not allow for reasonable alternative avenues of communication, the Court stated that "[i]n our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." (475 U.S. at 54, 89 L. Ed. 2d at 42, 106 S. Ct. at 932.) Because the ordinance left 520 acres or more than 5% of the entire land area of Renton available for adult uses, the Court concluded that it fulfilled this requirement.

The plaintiffs contend that the appellate court misapplied the standards announced by the Supreme Court in *Renton,* by finding that the industrially zoned areas in which adult uses are permitted do not provide an adequate alternative channel to operate their businesses.

The defendants argue that the appellate court opinion

is consistent with *Renton* because industrial zones do not provide adult uses with a reasonable opportunity to open and operate and dramatically reduce public access to constitutionally protected communication.

Expert witnesses for both the plaintiffs and defendants provided exhaustive findings and research on the suitability and availability of industrial zones for adult uses. The defendants' primary expert witness, a quantitative urban geographer, testified that unincorporated Cook County comprises 190.59 square miles, and that I-2, I-3 and I-4 zoned areas compose 10.8 square miles or 5.7% of the total land areas of unincorporated Cook County. On cross-examination, the defendants' expert admitted that when the Cook County Forest Preserve in unincorporated Cook County is excluded from the total land area measured, the industrial-zoned areas comprise 8.9% of available land.

The appellate court, relying on the defendants' expert witness testimony, found that the industrial zones where adult uses are a permitted use fail to provide those uses a reasonable opportunity to operate. The defense witness visited all the I-2, I-3, and I-4 zoned areas, totaling approximately 78 areas, and concluded that the vast majority were unavailable and unsuitable for operation of an adult use.

One of the plaintiffs' witnesses, a real estate broker and appraiser who also made on-site examinations, testified that a substantial quantity of privately owned industrially zoned land is available for purchase. His tesimony concerned the suitability of particular sites within industrially zoned areas often conflicted with the defendants' expert witness; he often found sites labelled as unsuitable or unavailable by the defendants' expert to be suitable, available, or both. He stated further that

while sewer and water facilities are necessary for an adult use, they could be adequately accommodated with a private well and septic system, if public sewer and water services were unavailable.

The plaintiffs also offered the expert testimony of an urban economic geographer who conducted a license plate study to measure the market area of adult uses. He concluded that approximately 40% of adult use customers came from greater than 10 miles to patronize these businesses and that the market area encompasses at least a 20-mile radius around the defendant adult use businesses.

We agree with the plaintiffs that the appellate court applied a standard more demanding than that required by *Renton*. In order for a content-neutral zoning ordinance which regulates adult uses by providing where they can and cannot locate to withstand constitutional scrutiny, *Renton* requires that plaintiffs "refrain from effectively denying [defendants] a reasonable opportunity to open and operate an adult theater within the city." (Renton, 475 U.S. at 54, 89 L. Ed. 2d at 42, 106 S. Ct. at 932.) We believe that the present ordinance meets this standard.

The defendants argue that *Renton* requires the permissible use locations to be adequate and reasonably able to house the operation of an adult business, and point to *Basiardanes v. City of Galveston* (5th Cir. 1982), 682 F.2d 1203, *Purple Onion, Inc. v. Jackson* (N.D. Ga. 1981), 511 F. Supp. 1207, and *North Street Book Shoppe, Inc. v. Village of Endicott* (N.D.N.Y. 1984), 582 F. Supp. 1428, as support for their contention that the present industrial zones unduly restrict access to constitutionally protected materials in violation of *Young* and *Renton*. They further argue that the ordinance in *Renton* allowed

adult uses to locate in some commercial zones as of right without requiring a special use permit. They contend that they cannot operate their business on land which contains railroad yards, tank farms and other industrial facilities and that such land is unavailable and that therefore the county has effectively denied the defendants a reasonable opportunity to open and operate an adult business. The defendants argue that industrial zones are ill-suited to the operation of retail or commercial businesses because they must compete with factories and industrial facilities for available space, water and sewer service is inaccessible and would be costly to supply; and access to industrial zones is nonconducive to operating a consumer-oriented, small retail or commercial store.

In *Basiardanes* the Fifth Circuit struck down an ordinance restricting adult uses to the central business district and industrial zones. The court found that 500-foot and 1,000-foot dispersal requirements, also contained in the ordinance, resulted in the exclusion of adult uses from 80% to 90% of the three areas from which they are permitted to locate. Instead of analyzing the ordinance as a time, place or manner regulation, the court reached its result by analyzing the ordinance under *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176. The challenged ordinance in *Schad* banned all live entertainment in Mt. Ephraim. The Court in *Schad* stated that the case, therefore, was not controlled by the time, place or manner analysis of *Young*. (452 U.S. at 71, 68 L. Ed. 2d at 682, 101 S. Ct. at 2184.) The Court found the ordinance unconstitutionally overly broad because it prohibited a wide range of protected expression while failing to further a sufficiently substantial government interest. (452 U.S. at 72-74, 68 L. Ed. 2d at 682-84, 101 S. Ct. at 2184-85.) The court in *Basiardanes* found that the

challenged ordinance in that case virtually banned adult uses from locating in Galveston, prompting the court to strike down the ordinance under *Schad. Basiardanes,* 682 F.2d at 1214-15.) The present ordinance, however, does not have this effect and is properly analyzed under *Renton's* time, place or manner analysis.

Similarly, in *Purple Onion* the challenged ordinance established the central business district and light and heavy industrial areas as permitted areas for adult use businesses. The court found that the ordinance unconstitutionally restricted access to protected speech because only 10 sites out of 81 were not "wholly unacceptable" for adult uses due to their location. (*Purple Onion,* 511 F. Supp. at 1217.) Unlike the ordinance challenged here, which allows adult uses to locate freely in the permitted industrial zones, all adult uses were further subject to locational requirements within the permitted areas; the ordinance prohibited them from locating within 1,000 feet of another use and 500 feet from a residential or religious area or structure.

In *North Shore Book Shoppe* the city, as a defendant, could locate only two areas in the village, both zoned industrial, in which the plaintiff adult business would be permitted to operate under the ordinance. The court, therefore, found that the ordinance significantly burdened the plaintiff's first amendment rights and impaired public access to protected materials.

All three cases are factually distinguishable from the present cause. The present ordinance establishes approximately 78 industrially zoned areas in which adult uses may locate as a matter of right. These areas are scattered throughout unincorporated Cook County and range from sizes of several acres to almost 100 acres. Some of the industrially zoned areas are large enough to

contain several different sites for adult use businesses. Some areas contain buildings while other areas do not. Although the defendants' expert identified a few areas which were substantially occupied by industrial uses which he considered unsuitable for adult uses, the plaintiff's expert identified numerous areas, which in his opinion were suitable for an adult use. Moreover, the defendants' witness admitted that he considered a specific site or an area unsuitable for adult use if it were vacant. Under questioning by the plaintiff's attorneys, the defendnats' expert witness responded that certain industrially zoned areas would be suitable for adult uses if the land were available. This testimony supports the trial court's view that sufficient land was made available for the location of defendants' businesses.

In *Renton,* the Supreme Court was faced with the same arguments presented here; the adult use business owners in *Renton* argued that some of the land for permitted uses was occupied by existing businesses, that there were no commercially viable adult theater sites available and that practically none of the undeveloped land was currently for sale or lease. The Court rejected those contentions in *Renton,* stating:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. *** [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. *** ('The inquiry for First Amendment purposes is not concerned with economic impact')." *Renton,* 475 U.S. at 54, 89 L. Ed. 2d at 42, 106 S. Ct. at 932, quoting *Young v. American Mini Theaters* (1976), 427

U.S. 50, 78, 49 L. Ed. 2d 310, 330-31, 96 S. Ct. 2440, 2456 (Powell, J., concurring).

The present ordinance provides approximately 78 industrially zoned areas containing numerous available sites. *Renton* does not require the county to provide the defendants with land tailor-made to conform to the defendants' requirements. We believe that the ordinance provides the defendants with a reasonable number of suitable sites in which to relocate. Even though the defendants may have to expend a certain amount of money to relocate, the defendants "are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. [Citations.]" (*Young,* 427 U.S. at 78, 49 L. Ed. 2d at 330, 96 S. Ct. at 2456 (Powell, J., concurring).) Furthermore, we note that our result is consistent with that of courts considering challenges to similar adult use zoning ordinances after *Renton* (see *S&G News, Inc. v. City of Southgate* (E.D. Mich. 1986), 638 F. Supp. 1060 (upholding constitutionality of ordinance, under *Renton,* establishing commercial districts compromising 2.3% of total land area of county as permitted use area); *Dumas v. City of Dallas* (N.D. Tex. 1986), 648 F. Supp. 1061 (upholding constitutionality of ordinance, under *Renton,* establishing 8% to 10% of total land area of county as permitted use area); *SDJ, Inc. v. City of Houston* (S.D. Tex. 1986), 636 F. Supp. 1359 (upholding constitutionality of ordinance, under *Renton,* by finding that adequate alternative sites existed); *City of Vallejo v. Adult Books* (Cal. App. 1985), 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143 (upholding constitutionality of ordinance, under *Renton,* finding that a reasonable number of available sites existed). We find, therefore, that the present ordinance provides a reasonable number of alternative sites and does not

unconstitutionally suppress the defendants' free speech rights or unconstitutionally limit access to protected materials.

The defendants next contend that the ordinance is unconstitutional for failing to contain a grandfather clause exempting preexisting nonconforming uses. They note that most ordinances passed in the weake of *Young* contain grandfather clauses, and further argue that because neither ordinance upheld in *Young* and *Renton* applied to preexisting uses, the ordinance at hand is distinguishable from the analysis applied in those cases and is therefore unconstitutional.

The plaintiffs argue that because the ordinance contains an amortization clause, the lack of a grandfather clause does not render the ordinance unconstitutional. (Cook County Zoning Ordinance Sec. 13.16-4 *et seq.* (1981).) The amortization clause allows preexisting adult uses, which became nonconforming uses when the ordinance was passed, six months to relocate, along with a nondiscretionary six-month extension for those adult uses requesting it. Cook County Zoning Ordinance Sec. 13.16-4 *et seq.* (1981).

Although the ordinances upheld in *Young* and *Renton* both applied to future adult businesses only, ordinances providing for the amortization of preexisting adult uses, and thus lacking grandfather clauses, have been upheld both prior to and since *Renton*. See *Northend Cinema, Inc. v. City of Seattle* (1978), 90 Wash. 2d 709, 585 P.2d 1153 (upheld ordinance providing a 90-day amortization period for preexisting nonconforming adult theaters); *Hart Book Stores, Inc. v. Edmisten* (4th Cir. 1979), 612 F.2d 821 (upheld ordinance providing a six-month amortization period with a discretionary extension of time, for preexisting nonconforming adult businesses);

Dumas v. City of Dallas (N.D. Tex. 1986), 648 F. Supp. 1061 (upheld ordinance regulating sexually oriented businesses providing a three-year amortization period for preexisting nonconforming adult uses); *Lydo Enterprises, Inc. v. City of Las Vegas* (9th Cir. 1984), 745 F.2d 1211 (upheld ordinance regulating sexually oriented businesses providing a five-year amortization period for preexisting non-conforming uses); *Castner v. City of Oakland* (1982), 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (upheld ordinance regulating adult entertainment activity providing a one-year amortization period under which owner can apply for up to a two-year extension); *City of Vallejo v. Adult Books* (1985), 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143 (upheld ordinance regulating adult bookstores and theaters providing for a one-year amortization period under which owners could apply for an extra year if they could show extreme hardship).

We do not believe that the lack of a grandfather clause in the present ordinance renders it unconstitutional. The defendants, as owners of adult uses which became preexisting, nonconforming uses when the ordinance was passed in 1981, are given sixi months ot relocate and an additional six months if they apply for a certificate of nonconformance and amortization schedule from the department of building and zoning. (Cook County Zoning Ordinance Secs. 13.16-4-1, 13.16-4-2, 13.16-4-3 (1981).) Additionally, adult uses may seek an amortization period longer than 12 months. (Cook County Zoning Ordinance Sec. 13.16-4-4 (1981).) We note from the record that although denied by the zoning board of appeals. Only defendant Mannheim Bookstore applied for a longer amortization period.

Defendants allege that the six-month amortization period violates the first amendment because it is unreasonably short. They note that a nonconforming use

is a property right of which the owner cannot be unreasonably and arbitrarily deprived. (*City of Des Plaines v. LaSalle National Bank* (1976), 44 Ill. App. 3d 815.) They argue that a six-month amortization period is unreasonably short because of the first amendment interest involved and attempt to establish such unreasonableness by examining factors they claim other courts rely on in determining the reasonableness of amortization periods. They further contend that the ordinance violates the equal protection clause of the United States Constitution (U.S. Const., amend. XIV) because other nonconforming uses are permitted more time to amortize.

The plaintiffs argue that courts reviewing amortization clauses look to see whether the benefit to the public of requiring amortization is unreasonably disproportionate to any loss to the property owner. (*Village of Oak Park v. Gordon* (1965), 32 Ill. 2d 295.) They contend that the validity of the ordinance's amortization clause should be viewed independently of any first amendment claims. Plaintiffs further argue that because the defendants failed to present any evidence in support of their contention that the amortization period is unreasonably short, the defendants cannot rely upon the factors most courts look to when balancing the public benefit against the property owner's loss. Included in these factors, the plaintiffs contend, are the purchase price of the property, the amount of investment in the property, and the income earned and lost.

Even under the careful scrutiny that the defendants urge we apply in examining amortization clauses terminating preexisting nonconforming adult use businesses (see *Purple Onion, Inc. v. Jackson* (N.D. Ga. 1981), 511 F. Supp. 1207, 1224), we find the present time period to be reasonable. In addition to the initial six

months given a nonconforming use to relocate, that time may automatically be extended for another six months through application for a nondiscretionary certificate of nonconformance. (Cook County Zoning Ordinance Secs. 13.16-4-1 through 13.16-4-3 (1981). Nonconforming uses, therefore, have 12 months to amortize if they choose to follow the applicable procedures. In *Village of Oak Park v. Gordon* (1965), 32 Ill. 2d 295, we held that amortization ordinances are entitled to a presumption of validity and that "this presumption may be dissipated by a showing that the public welfare does not require the restriction of use and resulting loss to the property owner." (*Oak Park,* 32 Ill 2d at 296.) Although we found the amortization clause in that case to be unconstitutional for lacking substantial evidence of a public interest in amortizing the defendant's property, we noted that each case "must be judged upon the particular facts of that case with due consideration given to the respective interests of the public and the individual property owners." (*Oak Park,* 32 Ill. 2d at 298.) The defendant in *Oak Park* presented financial evidence of his initial purchase price and additional investment in improvements. The court noted that in the cases cited by the plaintiff city holding amortization plans valid, there was an "express finding that the public interest clearly justified the financial loss to the individual property owner." (*Oak Park,* 32 Ill. 2d at 298.) The factors that the court considered in balancing the defendant's interest against the public's included the defendant's purchase price, investment costs and income loss. (*Oak Park,* 32 Ill. 2d at 297.) Our appellate court has also looked at the cost of complying with an ordinance as a factor to be considered (*Village of Glenview v. Velasquez* (1984), 123 Ill. App. 3d 806, 810). Other courts upholding amortization clauses in ordinances regulating adult uses have also focused primarily on economic considerations. In *SDJ, Inc. v. City of Houston* (S.D. Tex. 1986), 636 F.

Supp. 1359, the court upheld an amortization clause providing a six-month period (with a provision allowing for a discretionary extension if a property owner proves he is unable to recoup his investment within six months) for the amortization of plaintiff's sexually oriented business. The court noted that "recoupment of investment is the major consideration in determining the reasonableness of an amortization provision." *SDJ,* 636 F. Supp. at 1371.

The defendants, citing *Village of Glenview v. Velasquez* (1984), 123 Ill. App. 3d 806, argue that the length of time to amortize in relation to the nature of the use should be considered, noting that the time limit should be based on the nature of the case and commensurate with the investment involved. Because the defendants failed to present any evidence of their purchase costs, improvement costs, loss of income, depreciation, or costs of relocation, they have failed to show why the presumption of validity attached to the amortization clause should be overturned. We note that the trial judge stated:

> "[T]he defendants have not presented any evidence of possible economic loss, either as a result of the relocation because of the application of the ordinance to their use of because of the amortization schedule provided thereon."

We are precluded from balancing the harm to the defendants of relocating within six months against the benefits to the public because of this lack of evidence. The county, on the other hand, as the appellate court realized, has presented more than sufficient evidence detailing the deleterious effects that a concentration of adult uses has upon surrounding commercial and residential areas. (150 Ill. App. 3d at 17.) In a similar

case, the Supreme Court of Washington upheld the constitionality of an ordinance regulating the location of adult motion picture theaters which provides a 90-day amortization provision for preexisting nonconforming uses. (*Northend Cinema, Inc. v. City of Seattle* (1978), 90 Wash. 2d 709, 585 P.2d 1153.) The court found that the theater owners were not rigidly bound to their lease terms and were not required to exhibit adult films. The court noted:

> "[T]he court below found appellants had not come forward with any clear evidence of economic harm. The main thrust of their objection, that simply having to move to another location or show a different type of film is substantial economic harm, is unsupported by any clear evidence. The court had a right to conclude that appellants' allegations they will suffer economic harm were speculative at best." *Northend,* 90 Wash. 2d at 721, 585 P.2d at 1160.

In the alternative to their contention that the amortization period is unreasonably short, the defendants argue that the amortization period violates the equal protection clause of the United States Constitution because other uses are permitted more time to amortize. The defendants, however, fail to present any argument or cite any cases showing how their equal protection rights are being violated. Three appellate court cases which are cited, upholding various municipal amortization provisions of varying lengths, concern the reasonableness of such provisions and do not address or contain any analysis concerning the equal protection clause. (*Village of Gurnee v. Miller* (1966), 69 Ill. App. 2d 248; *Village of Skokie v. Walton on Dempster, Inc.* (1983), 119 Ill. App. 3d 299; *Village of Glenview v. Velasquez* (1984), 123 Ill. App. 3d 806.) Our Rule 341 states that "[p]oints not argued are waived." (107 Ill. 2d Rules

341(e)(7), (f).) We therefore decline to address this argument. See *Environmental Protection Agency v. Pollution Control Board* (1986), 115 Ill. 2d 65, 71; *Jenkins v. Wu* (1984), 102 Ill. 2d 468, 483.

The defendants next argue that the 1,000-foot restrictions applicable to adult uses in commercial zones (Cook County Zoning Ordinance Sec. 13.16-1 (1981)) are not the only locational restrictions in the ordinance. The defendants contend that provisions of the 1977 Ordinance forbidding more than two adult uses from locating within 1,000 feet of each other (Cook County Zoning Ordinance Sec. 13.16-1 (1977)) or any adult use from locating within 1,000 feet of any area zoned for residential use or use by churches (Cook County Zoning Ordinance Sec. 13.16-4 (1977)) are still applicable and were not stricken by an earlier court decision (*County of Cook v. World Wide News Agency* (1981), 98 Ill. App. 3d 1094), or repealed by the 1981 Ordinance. The defendants conclude that because the 1977 Ordinance's 1,000-foot locational requirements were not considered by the plaintiffs' expert in considering the suitability of the permitted industrial areas for adult businesses, the expert erroneously found many locations to be suitable by testifying that more than one adult use could locate at several available industrial sites.

The plaintiffs argue that the two 1,000-foot restrictions contained in the 1977 Ordinance fell as a matter of statutory construction after the 1981 *World Wide News* opinion. They contend that the remaining portions of the statute are incapable of being executed independently and therefore fell, by implication, under the *World Wide* holding. They also argue that the adoption of the 1981 adult use amendments was intended to be a comprehensive revision, superceding the 1977 Ordinance.

Cook County sought to regulate sexually oriented businesses in 1977 by passing an ordinance amending certain sections of the Cook County Zoning Ordinance of 1976 to include adult uses. The ordinance provided that such uses must locate in commercially zoned areas, must obtain a special use permit and must conform to the 1,000-foot restrictions previously discussed. In *County of Cook v. World Wide News Agency* (1981), 98 Ill. App. 3d 1094, the appellate court struck down the provisions of the ordinance which required adult uses to obtain special use permits, locate in commercial zones, and obtain a waiver if the use is within 1,000 feet of a residential area. (98 Ill. App. 3d at 1100.) The court found that "[s]uch a zoning scheme operates as a prior restraint on speech and is therefore unconstitutional." (98 Ill. App. 3d at 1100.) Subsequently, Cook County passed another ordinance amending certain sections of the Cook County Zoning Ordinance in 1981.

We initially note that the fundamental principle of statutory construction is to give effect to the intent of the legislature. *In re Marriage of Freeman* (1985), 106 Ill. 2d 290, 297; *People v. Richardson* (1984), 104 Ill. 2d 8, 15.

We must determine whether the provisions of the 1977 Ordinance amending the Cook County Zoning Ordinance which were stricken by the appellate court in *World Wide News* were severable so as to permit the remaining provisions to stand on their own. The general rule in determining whether an invalid portion of a statute is severable so that the remainder may stand is that "the unconstitutional part does not invalidate the balance if what remains '*** is complete in itself and capable of being executed wholly independently of that which is rejected *** unless it can be said that the General Assembly would not have passed the statute

with the invalid portion eliminated.' " (*George D. Hardin, Inc. v. Village of Mount Prospect* (1983), 99 Ill. 2d 96, 101-02, quoting *Commercial National Bank v. City of Chicago* (1981), 89 Ill. 2d 45, 73.) Applying that rule, we believe that the portions of the statute not invalidated cannot stand by themselves.

The 1977 Ordinance stated that special regulation of adult uses is necessary "to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood ***. The primary control or regulation is for preventing a concentration of these uses in one area." (Cook County Zoning Ordinance Sec. 13.16-1 (1977).) Because the appellate court struck down the provisions requiring adult use operations within 1,000 feet of a residential area to obtain a waiver of 60% of the persons owning, residing, or doing business within that area, adult uses would be free to locate near residential areas as long as there were not two other adult uses within 1,000 feet. This would circumvent the drafter's intentions of preventing the deleterious effects of adult uses (which the ordinance sought to locate solely in commercial zones) from blighting and downgrading the character of residential neighborhoods. We do not believe that the legislation would have been adopted with the invalidated provisions eliminated.

Moreover, an examination of the 1981 Ordinance further supports this view. The following examination of the later ordinance reveals that the 1981 Ordinance sets out a whole new regulatory zoning scheme which completely supercedes the 1977 Ordinance.

Every amendment of a statute is presumed to be made for some purpose, and effect is to be given to the amendment in a manner consistent with that purpose.

(*Freeman,* 106 Ill. 2d at 298.) Courts assume that the drafters of an amended statute or ordinance are aware of court decisions interpreting the earlier statute or ordinance. It must be further assumed "that the [drafter's] intention was to overcome the defects in the former law pointed out by [the] court and that it intended by the new act to remedy the defects pointed out in the former law." *People v. Beckman & Co.* (1932), 347 Ill. 92, 95. See 1A A. Sutherland, *Statutory Construction* Sec. 22.29 (1973).

Because section 13.16-4 of the 1981 Ordinance, replacing section 13.16-4 of the 1977 Ordinance stricken by the *World Wide* decision, creates amortization provisions applicable to preexisting nonconforming adult uses, it is clear that the drafters are seeking to remedy the defects articulated by the court in *World Wide.* They have purposely elected not to include a locational requirement pertaining to residential areas in the 1981 Ordinance. The defendants note, however, that because the 1981 Ordinance says that "Article 13 of the Zoning Ordinance is hereby amended by adding the following," the 1,000-foot restriction still applies. Courts, however, "must consider the language of the amended statute in light of the need for the amendment and the purpose which it serves." *People v. Richardson* (1984), 104 Ill. 2d 8, 16; *People v. Alejos* (1983), 97 Ill. 2d 502, 511.

The 1,000-foot restriction prohibiting no more than two adult uses to be established within 1,000 feet of each other is also no longer applicable. (Cook County Zoning Ordinance Sec. 13.16-1 (1977).) Although this provision was not stricken by the *World Wide* decision, the 1981 Ordinance sets out a whole new regulatory zoning scheme in section 13.16-1 which establishes industrial zones as permitted uses and commercial zones as special uses for adult businesses. Section 13.16-1 of the 1981

Ordinance also sets out a new locational restriction, prohibiting no more than two adult uses from locating within 1,000 feet of each other in commercial zones.

In *People ex rel. Hines v. Baltimore & Ohio Southwestern R.R. Co.* (1937), 366 Ill. 318, the court construed three amendatory acts which purported to amend a section of "An Act to revise the law in relation to counties" (the Counties Act) (Ill. Rev. Stat. 1935, ch. 34, par. 25). While each of the three amendatory acts purported to amend section 25, none of them expressly repealed any other act or section of an act. Each amendatory act also set forth section 25 as amended in its entirety. In holding that the third, and final act, was the one to be given effect, the court stated:

> "It is a general rule that where an act, or section of an act, is amended so as to read as it is repeated in the amendatory act, all such portions of the old act or section as are not repeated in the new act are repealed with or without any express words for that purpose, but all such portions of the old law as are retained, either literally or substantially, are regarded as a continuation of the old law and not as a new enactment." (*Hines,* 366 Ill. at 322.)

Because we find that the remaining portions of the 1977 Ordinance could not stand alone, and that the 1981 Ordinance contains a comprehensive and new section 13.16-1 (which includes a new zoning scheme establishing industrial zones as permitted uses and commercial zones as special uses, creates a new 1,000-foot restriction applicable only to commercial zones, and creates new amortization provisions), we find that neither of the challenged 1,000-foot provisions remain in effect today.

The defendants next argue that the ordinance is unconstitutional in requiring special use approval for the operation of an adult use in designated commercial zones without proscribing narrow, objective and definite standards for the county board of commissioners to follow in ruling on special use applications.

The plaintiffs contend that requiring a special use permit as a condition for locating an adult use in a commercial zone does not operate as a prior restraint on speech where adult uses can locate freely in industrial zones.

Two provisions of the ordinance are at issue: section 13.16-1, which states that adult uses are established as special uses in all the 245 commercially zoned areas of C-3, C-4, C-6 and C-8; and section 13.17, which states that special use for adult uses "shall be governed by the provisions of subsection 13.10 of this chapter." (Cook County Zoning Ordinance Secs. 13.16-1, 13.17 (1981).) Section 13.17-1 states:

> "The Board of Commissioners shall act to accept or reject the report to the Board of Commissioners of the Zoning Board of Appeals of its findings and recommendations on special use petitions for Adult Regulated Uses within 30 days after said reports are received by the Board of Commissioners." Cook County Zoning Ordinance Sec. 13.17-1 (1981).

We agree with the defendants that this provision impermissibly vests county officials with the power to discriminate on the basis of the content of the communication through selective enforcement. We can find no provisions in the ordinance setting standards or guidelines for the board of commissioners to follow in deciding whether to grant or deny special use permits.

Moreover, even though adult uses may locate as of right in industrially zoned areas, the Supreme Court has condemned the vesting of totally discretionary power in the hands of officials to grant or deny permits or licenses needed to engage in protected activity. *Shuttlesworth v. Birmingham* (1969), 394 U.S. 147, 151, 22 L. Ed. 2d 162, 167, 89 S. Ct. 935, 938-39.

In *Shuttlesworth* the Court struck down an Alabama ordinance requiring anyone wishing to participate in a parade, public demonstration or procession in Birmingham to obtain a permit to do so. The Court found that the ordinance conferred "virtually unbridled and absolute powers to prohibit any 'parade' *** or 'demonstration' in the city." (394 U.S. at 150, 22 L. Ed. 2d at 167, 89 S. Ct. at 938.) The Court held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." (394 U.S. at 150-51, 22 L. Ed. 2d at 167, 89 S. Ct. at 938.) Although the ordinance meets the standards set out in *Renton,* the county cannot choose to selectively open commercial zones for adult uses to locate in by vesting total discretion in the board of commissioners to grant or deny special use permits. Such a scheme gives the board the right to discriminate among adult uses on the basis of content and any other selective and subjective factors it deems relevant. Such authority violates the defendants' first amendment rights. See also *Zebulon Enterprises, Inc. v. County of DuPage* (1986), 146 Ill. App. 3d 515, 522; *Entertainment Concepts, Inc. III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497; *Little v. City of Greenfield* (E.D. Wis. 1983), 575 F. Supp. 656.

Although we find this provision of the ordinance unconstitutional, we believe that it is severable from the remaining provisions of the ordinance. As noted earlier,

the unconstitutional part of a statute or ordinance does not invalidate the remaining portion of the ordinance, providing the portion that remains is complete and capable of being executed wholly independently of that which is rejected, unless the drafters would not have passed the ordinance with the invalid portion eliminated. (*George D. Hardin, Inc. v. Village of Mount Prospect* (1983), 99 Ill. 2d 96, 101-02; *Commercial National Bank v. City of Chicago* (1981), 89 Ill. 2d 45, 73.) Because we earlier held that the provisions of the ordinance establishing adult uses as permitted uses in industrial areas satisfied the *Renton* standards, the present provision allowing adult uses to apply for a special use permit to locate in commercial zones is not required to sustain the ordinance under *Renton.* Severing it from the rest of the ordinance, therefore, does not affect the constitutionality of remainder of the ordinance,w hich can stand on its own. Likewise, because the county did not have to allocate additional space in commercial zones, the county's intent in passing the ordinance, to curb the effects of adult uses, is still served by the remainder of the ordinance. We do not believe that the county, if unable to allow adult uses to locate in commercially zoned areas, would have refrained from passing the ordinance to regulate such uses by permitting them to locate in industrially zoned areas. Section 13.17-1 of the 1981 Ordinance, therefore, allowing the board of commissioners to grant or deny special use permits in its discretion is held unconstitutional and severed from the ordinance.

The plaintiffs finally contend that the appellate court erred in applying a *de novo* standard of review which it believed was required by *Bose Corporation v. Consumers Union* (1984), 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949. The plaintiffs contend that *Bose* does not mandate independent review of first amendment issues involving

time, place and manner regulations. Like the Supreme Court in *Renton,* we need not address this issue since we find that under any standard of review the circuit court's findings should not have been disturbed. *Renton,* 475 U.S. at 53 n. 3, 89 L. Ed. 2d at 42 n. 3, 106 S. Ct. at 932-33 n.3.

Accordingly, the judgment of the appellate court is reversed and the judgment of the circuit court of Cook County is affirmed.

Appellate court reverse; circuit court affirmed.

APPENDIX B

Opinion of the Appellate Court of Illinois Construing the Cook County Zoning Ordinance

COUNTY OF COOK, a body politic and corporate, Plaintiff-Appellee, v. RENAISSANCE ARCADE AND BOOKSTORE, Robert T. Syverson, June B. Syverson, Sam Cecola, Frank and Anita Panno; Torch Club, Inc., Nick Stevens; Roaring Twenties Bookstore; Smokers Health Club, Sam A. Cecola a/k/a Salvatore A. Cecola, Frank and Anita Panno; Mannheim Books, Inc., Jewel Ann Ciotti, and Melrose Park National Bank as Trustee t/u/t #2059 dated May 16, 1977; Taray, Inc., Willie Sille, Ronald Martin, Harold Turner, Peggy Jean Case, Raymond Cisco, Defendants-Appellants (The Village of Franklin Park, Intervening Plaintiff-Appellee), 150 Ill. App. 3d 6, 501 N.E.2d 133, 103 Ill. Dec. 112 (1986).

No. 85-0717.

Appellate Court of Illinois,
First District, Second Division.

Feb. 18, 1986.
As Modified on Denial of
Rehearing Dec. 23, 1986.

Justice STAMOS delivered the modified opinion of the court upon denial of the petition for rehearing:

This is an appeal from an order of the circuit court of Cook County enjoining defendants from operating their adult bookstores, which are located in unincorporated Cook County, Illinois. On appeal, defendants challenge the constitutionality of the Cook County (hereinafter "County") zoning ordinance which predicated that

injunction.

This is the second time that Cook County's zoning scheme for adult uses is before this court. We had previously addressed the propriety of that scheme in *County of Cook v. World Wide News Agency* (1981), 98 Ill. App. 3d 1094, 54 Ill. Dec. 270, 424 N.E.2d 1173. An understanding of the issues raised in this second appeal requires an appreciation of the predecessor ordinance, and our decision on its validity. To that end, we detail those prior proceedings herein.

Cook County first sought to regulate "adult uses," as therein defined (see, *World Wide News Agency,* 98 Ill. App. 3d 1094, 1095, n. 1-3, 54 Ill. Dec. 270, 424 N.E.2d 1173), by the passage of its Adult Regulated Use Ordinance, enacted October 3, 1977. (Cook County Zoning Ordinance, 1977, pars. 13.16 *et seq.*) Under that ordinance, the County successfully sought to enjoin operation of an adult bookstore, and the bookstore appealed. On appeal, we reversed the holding of the circuit court based on our decision that certain aspects of the zoning ordinance created an unconstitutional prior restraint on protected speech. (*World Wide News Agency* 98 Ill. App[. 3d 1094, 1100, 54 Ill. Dec. 270, 424 N.E.2d 1173.) Significant to our discussion of the revised ordinance at issue herein was the nature of our 1981 decision.

In that opinion, we initially noted that the County's stated objective in enacting the ordinance (which sought to prevent a concentration of adult uses in any one area so as to avoid the deleterious effects that such concentration presented) served a valid governmental objective, and was constitutionally sound. (98 Ill. App. 3d 1094, 1097, 54 Ill. Dec. 270, 424 N.E.2d 1173.) We then went on to analyze the case by phrasing the issue and

settling it as follows:

> "The defendants contend that the zoning ordinance *** operates as a prior restraint on the sale of constitutionally protected materials. *** Such restrictions are permissible only so long as they are of no greater than necessary to further the County's interest. We cannot say that the ordinance in the instant case satisfies this requirement." (98 Ill. App. 3d 1094, 1097, 1099, 54 Ill. Dec. 270, 424 N.E.2d 1173.)

Of particular significance to that decision were those portions of the ordinance which required all operators of adult book stores to obtain special use permits, and in most instances the consent of their neighbors, as a prerequisite to doing business.

The 1977 ordinance initially provided that adult uses could locate only in areas zoned C-3, and then only where they had obtained a special use permit providing for such operation. The process by which such a permit could be obtained was successively (a) application to the Department of Building and Zoning; (b) public hearing by the Zoning Board of Appeals; (c) recommendation of that Board to the Board of Commissioners of Cook County; and (d) the ultimate grant or denial of the permit by that Board. The Zoning Board of Appeals was given a list of conditions upon which to base its decision (paragraph 13.16-2 (a through d) of the ordinance), but no such conditions were placed upon the Board of Commissioners. The ordinance also provided that no two adult uses could locate within 1,000 feet of one another. (Section 13.16-1.) Additionally, the ordinance stated that it was unlawful to establish an adult bookstore, adult motion picture theatre or other facilities of a similar type within 1,000 feet of any area zoned for residential use or

used by churches or schools. (Section 13.16-4.) (See, *World Wide News Agency,* 98 Ill. App. 3d 1094, 1095-96, 54 Ill. Dec. 270, 424 N.E.2d 1173.) Finally, the ordinance provided for a waiver of the restrictions as to location where the applicant obtained the consent of 60 percent of those residing, owning or doing business within 1,000 feet of the location sought by the applicant.

In reversing the circuit court's grant of an injunction, we focused primarily on the prior restraint aspect of the scheme, stating in summary that:

> "various sections of the Cook County Zoning Ordinance require the following: (1) that all operators of certain adult uses *** must obtain special use permits; (2) that these uses must be located in areas zoned C-3 ***; and (3) that the operators obtain a waiver of 60% of the persons owning, residing or doing business within 1,000 feet of the location **. Such a zoning scheme operates as a prior restraint on speech and is therefore unconstitutional." (98 Ill. App. 3d 1094, 1100, 54 Ill. Dec. 270, 424 N.E.2d 1173.)

It should be obvious from even the most cursory reading of our opinion that it was only the prior restraint aspects of the zoning ordinance which were stricken by this court; the remainder of the zoning ordinance was left intact. In fact, given our reliance on the United State's Supreme Court's decision in *Young vb. American Mini Theatres, Inc.* (1976), 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, and our statement that the objective of the ordinance was constitutionally sound, it was clear that we approved the remaining provisions of the ordinance. (We note parenthetically that our approval was alluded to in the 1981 amendment to the zoning ordinance. Cook County Zoning Ordinance, 1981, par. 13.16-1.)

Thereafter, on December 7, 1981, the Cook County Board of Commissioners adopted an amendment to the Cook County Zoning Ordinance relating to adult uses. Section 6 of that amendment states that "Article 13 of the Zoning Ordinance is hereby amended *by adding the following.*" (Emphasis supplied.) As noted, the amended ordinance declares that this court had approved the purpose of the ordinance. It goes on to provide as follows:

> "In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas, particularly adjacent and nearby residential and commercial areas where nurseries, schools, nursing homes, churches and similar uses are located. Proper and realistic zoning and special regulations are necessary to insure that these adverse effects will not contribute to the blighting, downgrading of the surrounding neighborhood, or discouraging normal development of undeveloped areas. These special regulations are itemized in this section. A primary control or regulation is for the purpose of preventing a concentration of these uses in any one area. To prevent concentration of such uses from having an adverse effect upon the adjacent and nearby residential and commercial areas above referred to, such uses are hereby established as permitted uses in all the 78 industrially zoned areas of I-2, I-3, and I-45 and as special uses in all the 245 commercially zoned areas of C-3, C-4, C-6 and C-8. To prevent such uses from having an adverse effect upon adjacent areas in the C-3, C-4, C-6 and C-8 commercial zones, not more

than two such uses shall be established within one thousand feet of each other."

The amendment proceeds to provide that the provision as to location may be waived, again if certain findings are made by the Zoning Board of Appeals.

Notice was given to each of the defendants in January 1982, pursuant to the amended ordinance, that their businesses were nonconforming and subject to amortization. In March 1983, plaintiff Cook County filed the instant injunctive action against defendants, who thereupon filed motions to dismiss the complaint, challenging the constitutionality of the ordinance, which motions were denied by the circuit court. Defendant Mannheim Books filed a motion for substitution of judges, which was denied as untimely presented. On March 19, 1983, trial of this cause began.

There are 1,225 I (industrial), C (commercial) and R (residential) zones in unincorporated Cook County. The amended ordinance permits the location of adult uses as of right in only the 78 zones designated I-2, I-3 and I-4. The ordinance also permits the operation of adult uses in C-3, C-4, C-6 and C-8 commercial zones, but conditions such operation upon first obtaining special use approval from the county. (Cook County Zoning Ordinance, 1981, par. 13.16-1.) The process required for such permits is substantially similar to that of the 1977 ordinance and condemned by this court in *World Wide News Agency,* in that it requires findings by the Zoning Board of Appeals but does not place any controls on the ultimate grant or denial of the permit by the County Board of Commissioners. (Cook County Zoning Ordinance, 1981, par. 13.16-2.) Pre-existing uses which do not conform to the amended ordinance are subject to the amortization provision of section 13.16-4 of the ordinance, which

requir4es the discontinuance of a pre-existing but nonconforming adult use within six months of notice by the County.

At trial, defendants presented expert testimony that the total area of I-2, I-3 and I-4 zones comprised 5.7 percent of unincorporated Cook County, and that the overwhelming majority of sites located within those zones were either unsuitable or unavailable for adult use. Plaintiff presented expert testimony that there was much vacant land in the I zones upon which adult uses could operate.

Other witnesses testified as to the deleterious effects that defendants' establishments had on areas inwhich they did business and as to numerous incidents in which prostitution was observed in or near the establishments.

On March 8, 1985, the circuit court entered an order for a permanent injunction in which it found that the ordinance furthered an important and substantial governmental interest, that the county's regulation of adult uses was unrelated to the suppression of free expression, and that the ordinance would not have the effect of suppressing access to any of the sexually explicit materials purveyed by defendants. The circuit court found that there were "at least 78 different I-2, I-3 and I-4 locations within unincorporated Cook County, manyof which would be appropriate relocation sites for adult uses; and which would make the kind of material and entertainment regulated by the ordinance available to the general public." Defendants appeal from this order.

Defendants contend on appeal that the Cook County zoning ordinance offends the First and Fourteenth Amendments to the United States Constitution. They argue that the ordinance unconstitutionally restricts

access to information that is protected by the First Amendment. We find defendants' argument persuasive.

The seminal case in defining the degree to which non-obscene, adult businesses may be regulated is *Young v. American Mini-Theatres* (1976), 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, in which case the Court upheld a Detroit zoning ordinance against a constitutional attack. The Detroit Common Council sought to disperse the sites of adult theaters so that a concentration of these businesses would not create a "skid row" environment. To achieve this end, the ordinance provided that an adult theater could not locate within 1,000 feet of any two "regulated uses" including adult bookstores, cabarets, bars, pool halls, and similar establishments that are commonly associated with a "skid row" neighborhood. 427 U.S. 50, 52, n. 3, 96 S. Ct. 2440, 2444, n. 3, 49 L. Ed. 2d 310.

A plurality of the *Young* court found that the Detroit ordinance did not operate as an impermissible restraint upon constitutionally protected speech. This was so, according to the plurality, because the ordinance did not substantially restrict public access to adult films. 427 U.S. 50, 62, 96 S. Ct. 2440, 2448, 49 L. Ed. 310.

Additionally, the plurality found that the ordinance survived strict scrutiny under the equal protection clause of the fourteenth amendment. In the plurality's judgment, evne though the First Amendment protects non-obscene but sexually explicit communication, a State may legitimately use the content of this material as a basis for placing it in a different classification from other kinds of information or entertainment. The Detroit ordinance passed constitutional muster because the government had a valid interest in protecting the character of its neighborhoods, and the council was able

to set forth a factual basis for concluding that its regulation would achieve the desired end. (427 U.s. 50, 70-71, 96 S. Ct. 2440, 2452-2453, 49 L. Ed. 2d 310.) The result would have been different, according to the plurality, if the Detroit ordinance had substantially suppressed lawful speech or affected existing establishments. Since there were "myriad" locations in which new adult businesses could operate, however, the ordinance did not offend the constitution. 427 U.S. 50, 71, n. 34, 96 S. Ct. 2440, 2453, n. 34, 49 L. Ed. 2d 310.

Justice Powell concurred in the *Young* case and set forth a four-part test to determine the constitutionality of zoning laws that infringe upon freedom of expression. Under the standard used by Justice Powell, a regulation is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is not greater than is essential to the furtherance of that interest." 427 U.S. 50, 79-80, 96 S. Ct. 2440, 2456k-2457, *citing United States v. O'Brien* (1968), 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672.

Several years after the *Young* decision, the United States Supreme Court again considered the constitutionality of a zoning ordinance that curtailed free speech. In *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671, the Court struck down a municipal ordinance that prohibited all live entertainment within the city limits. According to the *Schad* court, when a zoning ordinance "infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." 452 U.S. 61, 68, 101 S. Ct. 2176, 2182, 68 L. Ed. 2d 671.

Most recently, the United States Supreme Court handed down its decision in *City of Renton v. Playtime Theatres* (1986), __ U.S. __, 106 S. Ct. 925, 89 L. Ed. 2d 29, wherein the Court upheld the constitutionality of a zoning ordinance drastically distinct in approach from that approved in *Young* and stricken in *Schad.* Whereas Detroit elected to disperse adult uses, and Mount Ephraim sought to ban them, Renton chose to concentrate them. The vehicle employed by Renton to achieve that end was a restriction on the location of any new adult uses within 1,000 feet of any residential area, or any church, school or park. As a consequence of that restriction, there were only 520 acres in the city (roughly five percent of the land total) in which adult uses could operate.

The Supreme Court deemed the case to be controlled by its previous decision in *Young*. The analysis began by labelling Renton's ordinance a "content-neutral time, place and manner" regulation, because its aim was not based on the *content* of the speech regulated, but on the *secondary effects* of that expression upon adjacent neighborhoods. (__ U.S. __, ___, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29, 37.) In reaching that conclusion, the Court emphasized that Renton's ordinance was prospective only, and did not ban adult uses outright. Where ordinances are content-neutral, the Court stated, they are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." (__ U.S. __. ___, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29, 37.) The Court concluded that Renton's ordinance met that test.

The ordinance *sub judice* does not fit neatly into the analysis of any of the above cases. It does not seek merely to disperse adult uses, as in *Young*, nor does it

seek either to concentrate them, as in *Renton,* or ban them, as in *Schad*. To the contrary, Cook County has chosen to incorporate certain aspects of both Detroit's approach as well as portions of Renton's. Despite the Supreme Court's approval of these methods in isolation, the amalgam of schemes embraced herein does not survive scrutiny. This is true under any of the above analyses, as Cook County's scheme significantly impedes access to constitutionally protected materials.

Initially, we must address the County's argument that we are per se bound by the circuit court's factual determinations. The County premises that assertion upon Supreme Court Rule 366 (Ill. Rev. Stat. 1985, ch. 110A, par. 366), which limits courts of review to a determination of whether the judgment is against the manifest weight of the evidence. We believe that our inquiry is guided by the principles enunciated in *Bose Corporation v. Consumers Union of the U.S.* (1984), 466 U.S. 485, 499, 510, 104 S. Ct. 1949, 1965, 80 L. Ed. 2d 502, wherein the Court stated:

> "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' *New York Times v. Sullivan,* supra [376 U.S. 254], at 284-286 [84 S. Ct. 710, 728-29, 11 L. Ed. 2d 686]."

* * * * * *

> "The requirement of independent appellate review reiterated in *New York Times v. Sullivan,* is a rule of federal constitutional law."

It goes without saying that if such inquiry is mandated by our Federal Constitution, any contrary rule of narrower limitation must yield. Nowhere in *Bose* is there any indication that a more circumscribed review is contemplated. Indeed, the majority therein suggested that an independent review was necessary in the First Amendment arena as an essential bulwark to the protections encompassed by that amendment, particularly where, as here, the question is not strictly factual but presents mixed questions of law and fact. We are bound by that requirement in our discussion herein.

Regardless of whether we employ the approach used in *Young,* or the *Renton* rubric, Cook County's zoning ordinance is unconstitutional as it is unduly restrictive of First Amendment freedoms.

Unlike the ordinance in *Young,* which merely dispersed adult uses, the ordinance here relegates adult uses to industrial locations ill-suited to the operation of retail or commercial businesses. Defendants' expert witness, an urban geographer, examined the I-2, I-3, and I-4 zones where adult uses are free to operate. The geographer determined that these districts are inappropriate locations in which to establish a consumer-oriented enterprise since they are poorly lighted, relatively inaccessible, and characterized by heavy industrial or agricultural uses.

The plaintiff presented testimony by its own expert witnesses to rebut the defendants' evidence. A real estate appraiser testified that as much as 90 percent of the vacant land in I-2, I-3, and I-4 zones may be available for purchase at some price. The appraiser also said that in his view, several of the industrial zones were suitable for adult uses. In addition to the appraiser's testimony, the plaintiff also offered the testimony of an urban

geographer.; The geographer concluded from a survey of license plates that approximately 40 percent of the defendants' customers would travel 10-20 miles to reach an adult business.

Despite the testimony of these experts, plaintiff has failed to refute the fact that its ordinance substantially suppresses lawful speech. Because the ordinance significantly impedes public access to adult uses, it violates the standard set forth by the plurality in *Young*. In contrast to the ordinance in *Young,* the cook County ordinance applies to existing as well as new establishments. An existing adult business located in a commercial zone must still secure a special use permit, or it must cease to operate within six months. (Cook County Zoning Ordinance, 1981, par. 13.16-4.) It is not generally unconstitutional for the government to apply a zoning ordinance to existing uses. (*Hart Book Stores, Inc. v. Edmisten* (4th Cir. 1979), 612 F.2d 821, 830.) However, most adult zoning ordinances passed in the wake of the *Young* decision contain grandfather clauses that exempt existing uses. (*Purple Onion, Inc. v. Jackson* (N.D. Ga. 1981), 511 F. Supp. 1207, 1224.) When a zoning ordinance applies to existing uses, and affects First Amendment rights, it must be carefully scrutinized. (511 F. Supp. 1207, 1224.) Although lack of a grandfather clause would not in itself be fatal, this fact, along with the other restrictions placed upon adult businesses, makes Cook County's ordinance unconstitutionally suppressive of free speech.

Furthermore, the ordinance is suppressive of free speech because it banishes adult businesses to obscure industrial zones. Even if it is possible, as plaintiff contends, ofr an adult business to operate inone of these locations, it is extremely impractical. There is little likelihood that consumer-oriented enterprises like those

affected by this ordinance could function in the midst of industrial or agricultural operations. Adult uses would languish in an industrial zone, and their remote location might eventually drive them out of business altogether. When the effect of a zoning ordinance is that a medium for lawful speech is squeezed out of its desirable location to one that is undesirable, and public access to this communication is dramatically reduced, then the ordinance runs afoul of the First Amendment. *See, Basiardanes v. City of Galveston* (5th Cir. 1982), 682 F.2d 1203, 1214; *North Street Book Shoppe v. Village of Endicott* (N.D.N.Y. 1984), 582 F. Supp. 1428, 1435; *Purple Onion, Inc. v. Jackson* (N.D. Ga. 1981), 511 F. Supp. 1207, 1224.

The plaintiff seeks to justify its ordinance by noting that adult businesses are allowed to operate as special uses in 245 commercial zones in unincorporated Cook County. Initially, we note that under the predecessor ordinance adult uses could operate in commercial zones conditioned on obtaining a special use permit, a procedure we struck down in *World Wide News Agency* owing to the prior restraint features of such a scheme. Moreover, while in theory this provision would expand the number of economically feasible locations in which defendants could operate their businesses, as a practical matter it is highly unlikely that the Cook County Zoning Board would approve an application for a special use permit by finding that the enterprise would be desirable enough to warrant its addition to the community. (*See* Cook County Zoning Ordinance, 1981, par. 13.10.) Indeed, the County produced extensive testimony regarding the adverse effects of adult uses on surrounding areas. Consequently, the fact that an adult business could, theoretically, operate as a special use does not significantly alter the suppressive nature of Cook County's zoning ordinance.

In addition to the fact that the ordinance in this case restricts public access to constitutionally protected materials, it also fails to pass Justice Powell's test as set forth in the *Schad* case. It is true, as plaintiff observes, that Cook County has the authority to restrict the location of adult businesses in a reasonable manner. (*Young v. American Mini-Theatres* (1976), 427 U.S. 50, 80, 96 S. Ct. 2440, 2457, 49 L. Ed. 2d 310.) Moreover, there is no doubt that the government's interest in regulating adult uses is important and substantial. (427 U.S. 50, 80, 96 S. Ct. 2440, 2457, 49 L. Ed. 2d 310.) Plaintiff has set forth ample evidence that a cluster of adult businesses has a deleterious effect upon surrounding commercial and residential uses. Given the county's legitimate concern with the unsavory effect of adult uses, it seems clear that the regulation of such businesses is unrelated to the suppression of free speech.

Notwithstanding these salutary features of the ordinance,it is still overly broad. The incidental effect of this regulation is greater than is essential to protect the government's interest. This being so, the ordinance fails the fourth part of Justice Powell's test. It also violates the mandate of the *Schad* court that an ordinance affecting First Amendment rights must be narrowly drawn.

The articulated purpose of Cook County's ordinance is to insure that the "adverse effects [of adult uses] will not contribute to the blighting, downgrading of the surrounding neighborhood, or discouraging normal development of undeveloped areas. *** A primary control is for the purpose of preventing a concentration of these uses in any one area." (Cook County Zoning Ordinance, 1981, par. 13.16-1.) In keeping with this purpose, a provision of the ordinance disperses adult uses so that they cannot locate within 1000 feet of one

another. This portion of the law is narrowly drawn and essential to further the County's interest in preventing a concentration of adult uses from causing neighborhood blight.

However, the provision of the ordinance relegating adult uses to industrial zones is broader than is necessary to prevent neighborhood blight. It is the concentration of adult businesses that the county believes is most deleterious to a surrounding neighborhood. Banishing adult businesses to industrial zones does nothing to prevent their concentration; in fact, it encourages it. The dispersal provision alone would be sufficient to forestall the development of a "skid row" environment injurious to surrounding residential areas. This is exactly the procedure approved in *Young.*

It is true that the Cook County ordinance does not go as far as the ordinance in *Schad*. In the *Schad* case, all live entertainment was banned from the city, and here, adult uses are merely relegated to remote, unattractive locations. However, there is no significant difference, for First Amendment purposes, between driving lawful speech beyond the municipal borders and forcing it to an undesirable location. *North Street Book Shoppe v. Village of Endicott* (N.D.N.Y. 1984), 582 F. Supp. 1428, 1435.

Plaintiff claims that the Cook County ordinance is distinguishable from ordinances that have been found impermissibly restrictive of free expression. We are unpersuaded by this contention, however. The ordinance is at least as restrictive as some others that have been declared unconstitutional. (*See, e.g. North Street Book Shoppe, Inc. v. Village of Endicott* (N.D.N.Y.1984, 582 F. Supp. 1428.) In fact, Cook County's zoning law is even more restrictive than some ordinances that have been found to impermissibly burden free speech. For example,

in *Basiardanes v. City of Galveston* (5th Cir. 1982), 682 F. 2d 1203 and *Purple Onion, Inc. v. Jackson* (N.D. Ga. 1981), 511 F. Supp. 1207, the zoning laws unconstitutionally relegated adult businesses to unattractive locations, but the ordinances in those cases contained grandfather clauses. In this case, not only are adult uses banished to remote industrial hinderlands, but existing uses are subject to regulation along with future businesses. If the ordinances in *Basiardanes* and *Purple Onion* were constitutionally infirm, then the ordinance in the present case is unconstitutional as well.

Nor does the current ordinance survive the scrutiny mandated by the Supreme Court's decision in *City of Renton v. Playtime Theatres* (1986), __ U.S. __, 106 S. Ct. 925, 89 L. Ed. 2d 29. We do not, and indeed cannot, dispute the substantial nature of Cook County's purpose in enacting the ordinance (the first prong of the *Renton* analysis); the vice of the ordinance herein is that it runs counter to the second prong of the test, that being the availability of reasonable alternative avenues of communication. Notable among the features of *Renton's scheme were the fact that it was only prospective in nature, and the fact that it allowed adult theatres to locate and operate as of right in a wide variety of areas, consisting of*

> *" '[a]mple accessible real estate' including 'acreage in all stages of development from raw land to developed industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads.' " Renton,* __ U.S. __, __, 106 S. Ct. 925, 932, 89 L. Ed. 2d 29, 41.

Unlike Cook County, adult uses were not exiled by Renton to the industrial outback; rather, they were permitted as of right into commercial zones insulated by distance from residnetial areas where their objectionable side effects were minimal, and wherein they could freely

disseminate their materials. Under such circumstances, there were adequate reasonable alternative avenues of communication left intact. Access to adult materials was not unduly restricted. As is obvious from our prior discussion concerning *Young's* application, the same is not true under Cook County's ordinance. The County, rather than affording adult uses access to commercial zones, required them to compete with heavy industry. Although it is not unconstitutional to place adult businesses in a position where they must fend for themselves on an equal footing with other purchasers or lessees, it still offends the constitution to banish adult uses to a real estate market where they have no reasonable ability to compete with their neighbors. An adult bookstore or cabaret is simply not on an equal footing to compete with the Ford Motor Company, the Metropolitan Sanitary District, the Standard Oil Company or similar industrial enterprises that purchase and develop large tracts of property in I-2, I-3 and I-4 zones.

In addition, unincorporated industrial zones are often bereft of water or utility services. One of the County's own experts noted that a developer who wishes to build in an unincorporated industrial area must seek an intergovernmental agreement with a nearby municipality to provide those services, obtain services from a private utility company, or build his own wells and septic tanks. Given these circumstances, it seems not only commercially impractical, but economically unfeasible, for an adult business to relocate in an industrial zone. "Reasonable alternative avenues of communication" presupposes a level playing field; such is not the case where small consumer-oriented businesses are forced to compete with corporate and municipal giants. The ordinance at issue herein significantly burdens the defendants' opportunity to attempt to compete

successfully. For this reason, it fails the test embraced by *Renton*.

While the *Renton* court determined that a zoning ordinance need not provide commercially viable sites, it must still refrain from "effectively denying respondents a reasonable opportunity to open and operate an adult business." (*Renton*, __ U.S. __, ___, 106 S. Ct. 925, 932, 89 L. Ed. 2d 29, 42.) Apart from wherther it is commercially viable for adult businesses to purchase land in industrial zones, the quality and nature of this property makes it largely unsuitable for the operation of a bookstore or nightclub. By definition, land zoned for industrial use is ill-suited for consumer-oriented enterprises. We believe that the free dissemination of constitutionally protected material would be unduly burdened by relegating them to locations that are poorly lighted, relatively inaccessible, and characterized by heavy industrial and agricultural uses.

It is true that according to one of plaintiff's experts, several industrial sites in Cook County are suited to the establishment of an adult business by virtue of the fact that these sites border on major highways or roads. However, that expert did not establish that these large tracts had consumer access by streets on which defendants' businesses could operate. If defendants are forced not only to provide their own water, sewers, and utilities, but to build and identify their own streets and to install curbs, gutters and perhaps sidewalks amid tank farms and land fills, then the County has denied them a reasonable opportunity to operate.

The ordinance in *Renton* is different from the one herein, both on its face and in effect. In *Renton,* adult uses were not banished from commercial zones; they were simply requir4ed to locate a fixed distance from

residences, schools and churches. Here, adult uses are relegated to industrial zones and can only locate in commercial zones as a special use. The land available to adult theatres in *Renton* apparently included some commercial space occupied by office and shopping facilities. This is in marked contrast to the industrial areas opened in Cook County. In view of the fact that the County has not left available a reasonable alternative avenue of communication, the ordinance is unconstitutional under *Renton*.

The current Cook County ordinance is less restrictive than its predecessor; however, it still unconstitutionally burdens lawful speech. In *World Wide News Agency,* 98 Ill. App. 3d 1094, 54 Ill. Dec. 270, 424 N.e.2d 1173, we struck downt he predecessor's requirement for special use permits in commercial zones, owing to the burden such prior approval required. That defect was not corrected by opening up the industrial areas.

In conclusion, it is manifest that the County's objective in enacting the zoning ordinance was to prevent concentration of adult uses. It is true that local authorities must be free to experiment with zoning schemes to achieve that end. (*Renton,* __ U.S. __, __, 106 S. Ct. 925, 931, 89 L. Ed. 2d 29, 41.) In attaining that goal, however, the County must tread carefully so as not to unduly encumber access to constitutionally protected materials. In this case, the County's scheme, seeking to both disperse adult uses and to concentrate them, fails the test of reasonableness. It sweeps beyond the extent necessary to attain its goal. Banishing adult uses to industrial zones does nothing to prevent their concentration. Rather, it restricts access to them. Regardless of whether adult businesses are offensive to a majority of the community, the Cook County Zoning Board is not free to burden the defendants' rights to

disseminate information or provide entertainment. In order to insure freedom of expression, we must necessarily be exposed to some ideas, language or depictions that we find objectionable and view as the manure for the tree of liberty.

Defendants also contend that they were deprived of a fair trial due to the trial judge's denial of their petition for substitution. However, section 2-1001 of the Code of Civil Procedure requires applications for change of venue to "be verified by the affidavit of the applicant." (Ill. R$ev. Stat. 1985, ch. 110, par. 2-1001(c).) Defendant Mannheim Books' petition for change of venue due to prejudice of the trial judge was not so verified, and the trial court therefore properly denied it.

We reverse.

Reversed.

HARTMAN and SCARIANO, JJ., concur.

APPENDIX C

Notice of Appeal Filed by Appellant on June 20, 1988

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

MANNHEIM BOOKS, INC.,
Appellant,

vs.

THE COUNTY OF COOK, ILLINOIS,
Appellee.

No. 64750

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mannheim Books, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois entered in this action on March 30, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

by: /s/Adam Bourgeois
BOURGEOIS & NULL
Counsel for Appellant

PROOF OF SERVICE

Adam Bourgeois, attorney for Plaintiff, certifies that he served a copy of this NOTICE OF APPEAL upon the Defendant County of Cook through their attorney, Richard M. Daley, 500 Daley Center Chicago, Illinois and further that I served the Village of Franklin Park through their attorney, Dorothy Kinnaird, 79 W. Monroe Street, Suite 812, Chicago, Illinois on June 20, 1988, by enclosing a copy of same in an envelope properly addressed and stamped and placing it in a United States Mail Box at 155 North Michigan Avenue, Chicago, Illinois 60601.

by: /s/Adam Bourgeois
BOURGEOIS & NULL
Attorneys for Appellant
155 N. Michigan Avenue #600
Chicago, Illinois 60601
312/565-2570

APPENDIX D

Cook County, Illinois Zoning Ordinance
Approved December 7, 1981

APPROVED: COOK COUNTY BOARD OF COMMISSIONERS 12-7-81

RE: ZONING BOARD OF APPEALS
Docket #3716
Z.A. A-81-15
C.B. #107756

AN ORDINANCE AMENDING CERTAIN SECTIONS OF ARTICLES 5, 6, 13 AND 14 PERTAINING TO ADULT USES AND REGULATED ADULT USES OF THE COOK COUNTY ZONING ORDINANCE AND TO REVISE UNDER ARTICLE 13 NEW AMENDED USES, 13.16 AND 13.17 "ADULT REGULATED USE" OF THE COOK COUNTY ZONING ORDINANCE.

AN ORDINANCE AMENDING THE COOK COUNTY ZONING ORDINANCE - 1976

Be it enacted by the People of the County of Cook, represented in the County Board.

SECTION 1. - Sections 6.23 - Par. 3.; 6.33 - Par. 3.; 6.43 - Par. 3.; of the Zoning Ordinance are hereby amended by adding "Adult Book Stores".

SECTION 2. - Sections 6.23 - Par. 8.; 6.33 - Par. 8.; 6.43 - Par. 8.; are hereby amended by adding "Adult Mini Motion Picture Theater, Adult Motion Picture Theater, Adult Entertainment Cabaret, Massage Parlor, Massage

School.

SECTION 3. - Sections 5.34 - Par. 2.; 5.44 - Par. 2; 5.64 - Par. 2.; 5.84 - Par. 2.; of the Zoning Ordinance are hereby amended by adding: "Adult Book Stores".

SECTION 4. - Sections 5.34 - Par. 5.; 5.44 - Par. 5.; 5.64 - Par. 5.; 5.84 - Par. 5.; of the Zoning Ordinance are hereby amended by adding "Adult Mini Motion Picture Theater", "Adult motion Picture Theater", "Adult Entertainment Cabaret", "Massage Parlor", "Massage School".

SECTION 5. - Section 14.2, DEFINITIONS OF THE ZONING ORDINANCE, is hereby amended by adding the following:

ADULT BOOK STORE
An establishment having as a substantial or significant portion of its stock in trade books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", or an establishment with a segment or section devoted to the sale or display of such material.

ADULT ENTERTAINMENT CABARET
A public or private establishment which is licensed to serve food and/or alcoholic beverages and/or which features topless dancers, go-go dancers, exotic dancers, male or female strippers, male or female impersonators, male or female nude performers or dancers, and similar live entertainment, or wherein persons are permitted to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the public hair, anus, vulva or genitals.

ADULT MINI MOTION PICTURE THEATERS
An enclosed building with a capacity for less than 50 persons used for presenting materials distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", for observation by patrons therein.

ADULT MOTION PICTURE THEATERS
An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", for observation by patrons therein.

BOOK AND STATIONARY STORE
An establishment dealing in books, printed materials and stationary supplies which is not an Adult Book Store.

MASSAGE
The performance of manipulative exercises upon the human body of another by rubbing, kneading, stroking or tapping with the hand or hands, or with any mechanical or bathing device with or without supplementary aids.

MASSAGE PARLOR.
Any place or establishment where a massage is made available.

MASSAGE SCHOOL
Any place or establishment or facility which provides

instructions in the theory, method and practice of massage.

"SPECIFIED SEXUAL ACTIVITIES" are defined as:

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse or sodomy;

c. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"SPECIFIED ANATOMICAL AREAS" are defined as:

a. Less than completely and opaquely covered: (1) human genitals, public region; (2) buttock, and (3) female breast below a point immediately above the top of the areola;

b. Human male genitals in a discernible turgid state, even if completely and opaquely covered.

THEATER

An establishment used to observe films and other visual material which is neither an Adult Motion Picture Theater nor an Adult Mini Picture Theater.

SECTION 6. - Article 13 of the Zoning Ordinance is hereby amended by adding the following:

13.16 - ADULT REGULATED USES

13.16-1 - REGULATED USES

The Appellate Court of the State of Illinois has judicially confirmed that the purpose of these amendments as hereinafter stated serves a valid governmental interest.

In the development and execution of this Ordinance,

it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas, particularly adjacent and nearby residential and commercial areas where nurseries, schools, nursing homes, churches and similar uses are located. Proper and realistic zoning and special regulations of these uses are necessary to insure that these adverse effects will not contribute to the blighting, down-grading of the surrounding neighborhood, or discouraging normal development of undeveloped areas. These special regulations are itemized in this section. A primary control or regulation is for the purpose of preventing a concentration of these uses in any one area. To prevent concentration of such uses from having an adverse effect upon the adjacent and nearby residential and commercial areas above referred to, such uses are hereby established as permitted uses in all the 78 industrially zoned areas of I-2, I-3 and I-4 and as special uses in all the 245 commercially zoned areas of C-3, C-4, C-6 and C-8. To prevent such uses from having an adverse effect upon the adjacent areas in the C-3, C-4, C-6 and C-8 commercial zones, not more than two such uses shall be established within one thousand feet of each other. Uses subject to these controls are as follows:

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Adult Entertainment Cabaret

Establishment For the Sale of Beer Or Intoxicating Liquor for Consumption On The Premises When Less Than 50% Of the Premises is Devoted To The Preparation and Service of Food, However, In No Case Shall Those Establishments Where The Service Of Alcoholic Beverages Is Incidential To The Service Of

Food, As The Principal Activity Be Regulated By Section 13.16

Massage Schools

Massage Parlors

13.16-2 WAIVER

The County Board of Commissioners may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Adult Entertainment Cabarets, Massage Schools or Massage Parlors, if the following findings are made by the Zoning Board of Appeals:

a. That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b. That the proposed use will not enlarge or encourage the development of a "skid row" area.

c. That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d. That all applicable regulations of this Ordinance will be observed.

13.16-3 - WAIVER FOR ESTABLISHMENTS SERVING INTOXICATING LIQUORS

The 1,000 feet locational requirement for the sale of beer or intoxicating liquor for consumption on the premises in establishments required to be regulated under the provisions of 13.16-1, may be waived by the County Board of Commissioners, if the findings required in Section 13.16-2(a) through (d) can be made and after receiving a report and recommendation from the Zoning Board of Appeals.

13.16-4 - AMORTIZATION OF PRE-EXISTING

REGULATED USE
Any non-conforming building, structure, lot or regulated use which existed lawfully at the time of the adoption of these Amendments pertaining to ADULT REGULATED USES which shall become non-conforming upon the adoption of these amendments to the Zoning Ordinance may be continued as hereinafter provided.

13.16-4-1
Upon written notice from the Department of Building and Zoning to the owners or interests therein, that any building, structure, lot or regulated use is non-conforming under the Regulated Use provisions of the Zoning Ordinance as amended, the owners or interests therein shall, within three (3) months from the date of such notice, apply to the Department of Building and Zoning for a Certificate of Non-Conformance and Amortization Schedule.

13.16-4-2
Failure to apply for a Certificate of Non-Conformance and Amortization Schedule within three (3) months of the notice provided for in section 13.16-4-1, will require the amortization of the non-conformance within six (6) months of the notice provided for in section 14.16-4-1.

13.16-4-3
Non-conformances that have obtained a Certificate of Non-conformance and Amortization Schedule from the Department of Building and Zoning shall be discontinued within one (1) year of the notice provided for in section 13.16-4-1.

13.16-4-4
Where the applicants seek an amortization period longer than allowed in subsections 13.16-4-3, the applications

for a Certificate of Non-conformance and Amortization Schedule shall also include a statement in writing by the applicant, or his designated representative, as to the nature of the non-conformance and reasons for non-pursuance of conversion to a special use.

13.16-4-5
Applications filed under the provisions of subsection 13.16-4-4 shall be processed in accordance with the HEARING, AUTHORIZATION and STANDARDS FOR AMORTIZATION AND CERTIFICATION OF NON-CONFORMANCE provisions of the ZONING ORDINANCE contained in subsections 13.62; 13.63; and 13.64 of this ARTICLE THIRTEEN OF the Zoning Ordinance, as amended.

13.17
Special use for ADULT REGULATED USES shall be governed by the provisions of subsection 13.10 of this Chapter Thirteen (13) of the Zoning Ordinance, as amended.

13.17-1
The Board of Commissioners shall act to accept or reject the report to the Board of Commissioners of the Zoning Board of Appeals of its findings and recommendations on special use petitions for ADULT REGULATED USES within 30 days after said reports are received by the Board of Commissioners.

13.17-2
If the Board of Commissioners shall fail to act within 30 days after said reports are received said reports of the findings and recommendations of the Zoning Board of Appeals shall be considered final administrative and legislative actions.

13.17-3
None of the provisions of the Cook County Zoning Ordinance as amended pertaining to adult uses shall be construed to permit any use or activities that presently are or in the future may be prohibited by law.

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANNHEIM BOOKS, INC.,

Appellant,

v.

THE COUNTY OF COOK, ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION OF APPELLEE COUNTY OF COOK TO AFFIRM

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QUESTION PRESENTED

Whether a County zoning ordinance is consistent with this Court's holding in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986) and the First Amendment, where the ordinance merely regulates the location of sexually oriented businesses, permitting them to locate without restriction in industrial zones which comprise 5.7% of the County's total land area and which provides a myriad of suitable locations for adult businesses.

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In The

Supreme Court of the United States

October Term, 1988

MANNHEIM BOOKS, INC.,

Appellant,

v.

THE COUNTY OF COOK, ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION OF APPELLEE COUNTY OF COOK TO AFFIRM

The appellee County of Cook, Illinois, respectfully moves to affirm the judgment of the Supreme Court of Illinois on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The County of Cook, appellee herein, instituted this case in the trial court to enforce its zoning ordinance by seeking to enjoin Mannheim Books, Inc. (and four additional adult businesses whose cases were consolidated for trial) from operating sexually oriented adult businesses in violation of the County's zoning ordinance. The County of Cook is a home rule county pursuant to the 1970 Illinois Consti-

tution, art. VII, section 6(a), with zoning jurisdiction over widely scattered unincorporated areas of the county. Cook County is the most populous county in Illinois and is predominantly composed of incorporated municipal jurisdictions including the City of Chicago, each having independent zoning authority within their own borders.*

Mannheim Books, Inc., the appellant herein, is an adult bookstore which sells and exhibits sexually explicit books, magazines, paraphernalia, video tapes and movies. Appellant's business is located in unincorporated Cook County in a commercial zone where adult businesses are not permitted. The properties abutting the appellant's businesses to the north, west and across the street to the east are all zoned for residential uses. At the trial, appellant contended that because Cook County's ordinance permitted adult businesses only in industrial zones, the ordinance was unconstitutional in violation of the First Amendment.

A trial was conducted on the very question now on appeal, namely whether the industrial zones in unincorporated Cook County provide a sufficient number of suitable locations for sexually oriented businesses so as not to suppress access to First Amendment protected speech. The trial court held that the County's ordinance provided ample suitable locations for adult businesses and on March 8, 1985, entered an order enjoining the defendants from continued violation of the County's ordinance. The Illinois Appellate Court reversed, finding that industrial zones do not provide reasonable access for adult speech. *County of Cook v. Renaissance Arcade, et al.*, 150 Ill. App. 3d 6, 501 N.E.2d 133 (1986). Cook County appealed the deci-

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* The Village of Franklin Park, a municipal unit of local government having village boundaries located within a block of the appellant's adult bookstore, intervened as a plaintiff in this case prior to trial.

sion to the Supreme Court of Illinois which affirmed the trial court based on this Court's recent decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986), holding that Cook County's ordinance provides reasonable alternative locations for adult speech so as not to deny adult businesses an opportunity to open and operate in unincorporated Cook County. *County of Cook v. Renaissance Arcade, et al.*, 122 Ill. 2d 123, 522 N.E.2d 73 (1988).

The Evidence

Expert witnesses for plaintiffs and defendants visited each of the County's 78 industrial zones, land areas which total 10.8 square miles, comprising 5.7% of the land area in unincorporated Cook County. (C. R2321-2315, 3053)* The County's witness, an expert in real estate appraisal and development, identified numerous industrial sites throughout the County which he concluded would be suitable for adult businesses. Among the criteria which he considered were the sites' proximity to population centers and accessibility from major roadways. (C. R3300) This witness opined that vacant land was suitable for adult businesses because suitable structures could be built within a short time. (C. R3344-3345) An urban geographer also testified on behalf of the County as to the results of a license plate market study he conducted to determine the extent of the geographic market area for the defendants' adult businesses. (C. R3459-3464) Based on that study he determined the market area to be a twenty mile radius around the adult businesses. (C. R3465)

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* "C. R____" refers to the certified record on appeal filed with the Illinois Supreme Court.

The defendants' expert, also an urban geographer surveyed the industrial sites to determine if any were suitable for adult businesses. He testified that his survey automatically excluded any site if it was vacant or if it was not posted for sale or rent, because an attorney for the defendants had instructed him that such sites were unsuitable as a matter of law. (C. R2808, 2751) On reconsideration, he conceded that if an available pre-existing structure was not legally required for a site to be suitable, then several of the sites surveyed would be good locations for adult businesses. (C. R2812-2813, 2820, 2823-2829, 2842-2851) The defendants' expert further testified that his professional experience was preparing market studies and siting studies for grocery stores and health care facilities. (C. R2761) He stated that in this case he had not studied or otherwise obtained information on the effect of location in industrial zones on the operation of an adult business. (C. R2962) He further admitted that he performed no studies and had no specific knowledge about the economics of an adult business (C. R2559, 3074), nor what kind of building would suit the needs of an adult business. (C. R2961) While this witness believed that industrial locations would diminish the market for adult businesses (C. R2637), he conceded that customers would likely travel farther to patronize adult businesses than to a non-adult business. (C. R2853-2859)

ARGUMENT

ZONING SEXUALLY ORIENTED BUSINESSES INTO INDUSTRIAL ZONES DOES NOT DENY A REASONABLE OPPORTUNITY FOR SUCH BUSINESSES TO OPEN AND OPERATE UNDER *RENTON*, AND THE DECISION UPHOLDING THE ORDINANCE SHOULD BE AFFIRMED.

The Illinois Supreme Court's decision upholding Cook County's zoning ordinance is consistent with this Court's holding in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986), and raises no substantial questions not previously presented and decided by this Court in the *Renton* decision. For that reason alone, this appeal should be dismissed and the decision of the Illinois Supreme Court should be affirmed.

Appellant asserts that the Illinois Supreme Court erred by recognizing Cook County's 78 industrial zones as providing reasonable locations for selling and exhibiting sexually oriented materials and entertainment. The appellant contends that industrial zones are an unreasonable alternative because they are "commercially impractical" and "economically unfeasible" for the operation of an adult business. (J.S. 8)* Moreover, the appellant contends that industrial zones are unreasonable *per se* as locations for adult businesses. These contentions are refuted both by this Court's holding in *Renton* as to the applicable law, and by the extensive factual record of this case. Appellant has simply failed to assert any questions which can be supported by the record or which this Court has not previously decided.

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* "J.S. ___" refers to Jurisdictional Statement of the appellant.

The First Amendment requires only that local government refrain from effectively denying a reasonable opportunity for an adult business to open and operate. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 932 (1986). In *Renton*, adult theater owners made nearly identical arguments to those made herein, contending that the 520 acre set aside area where the City of Renton permitted adult theaters to locate, provided no commercially viable locations. *Renton*, 452 U.S. at 53-54, 106 S.Ct. at 932. Theater owners contended that the set aside zone in the City of Renton was not truly available because the land was either vacant or substantially occupied by a sewage disposal site and treatment plant, a horseracing track, a business park suitable only for industrial uses, a warehouse and manufacturing facility, an oil tank farm and a fully developed shopping center. *Playtime Theater, Inc. v. City of Renton*, 748 F.2d 527, 534 (1984). This Court rejected the argument and expressly refused to condition the reasonableness of alternative sites on the question of commercial viability stating that: "The inquiry for First Amendment purposes is not concerned with economic impacts." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932, citing *Young v. American Mini Theaters*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456 (1976).

Despite this Court's express refusal to consider economic impact as a relevant factor for First Amendment inquiry, the appellant contends that industrial sites in unincorporated Cook County should be found to be *per se* unreasonable for adult bookstore and adult use locations because they are "economically unfeasible" and "commercially impractical." (J.S. 8) This argument was rejected in *Renton*, and otherwise cannot be sustained in light of the record of this case. Even if this Court were persuaded to reconsider the question of economic impact as a test to determine whether First Amendment rights have been vio-

lated, the record of this case is devoid of any evidence on which to make a finding that adult businesses would suffer adverse economic impacts as a result of Cook County's ordinance. The appellant's own witness testified that he had not studied the economic effect of industrial locations on the operation of adult businesses. (C. R2962) Moreover, the appellant's witness testified that he had no knowledge of the economics or other operating criteria for an adult business such as building needs (C. R2961); or how much traffic volume was necessary to generate clientel (C. R2959-2960); nor did he otherwise study any location criteria to determine the location requirements of an adult business. (C. R2958) He conceded however that an adult business customer would likely travel farther to patronize an adult business than to a non-adult business. (C. R2857-2859) This opinion was confirmed by a market study of the defendants' customers which determined that the market area for the defendant adult businesses was as large as a 20 mile radius. (C. R3465) No other evidence on the question of economic impact was introduced to show negative impact on adult businesses.

Extensive evidence however does demonstrate the suitability of numerous Cook County industrial locations as sites for adult businesses. The County's expert testified that in his opinion, a site was suitable if it was in proximity to a population density, if it was accessible from major roadways, and if the site was physically capable of development. (C. R3300) He did not consider the lack of municipal water supply or sewers a barrier because private wells and septic systems are common in unincorporated areas (C. R3343); nor did the County's expert believe that the zoning classification of "industrial zone" impaired commercial development, noting that many retail/commercial uses are permitted in Cook County's industrial zones. (C. R3308-3309) The County's expert identified nu-

merous sites throughout the unincorporated county, which in his opinion satisfied these criteria. (C. R3233-3283) The appellant's own expert witness conceded that a number of these industrial sites would be suitable for adult businesses. *County of Cook v. Renaissance Arcade, et al.*, 122 Ill. 2d 123, 138, 522 N.E.2d 73, 79 (1988) (wherein the Illinois Supreme Court recognized this testimony as supporting the trial court's finding that a sufficient number of suitable sites were available).

The facts of this case thus compare with remarkable similarity to those presented in *Renton*, wherein a substantial portion of Renton's permissively zoned area was either vacant or developed with industrial uses, including a sewage treatment facility, oil tank farms, and manufacturing plants. See e.g., *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (1984). Nonetheless, this Court found that Renton's ordinance permitted adult theaters in 5% of the city's land areas and held that this quantity of land which included the vacant land and industrially developed land, provided adult theaters with a reasonable opportunity to open and operate. *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

The practical effect of the Renton ordinance and Cook County's ordinance is nearly identical. Both permit adult businesses to purvey sexually oriented materials freely, limiting only the location of operation. No restrictions are placed on the content of the materials purveyed and no limitations are placed on the number of permitted businesses. If a market exists for sexually explicit materials and entertainment, no evidence has been offered in this case to show that appellant's First Amendment rights will even be grazed by the ordinance's location requirement where the evidence shows that a sufficient number of suitable sites exist.

Thus, the contention that Cook County's industrial zones are commercially impractical or economically infeasible for adult businesses is nothing more than total speculation by the appellant and is plainly refuted by the evidence presented. There is simply no precedent cited by the appellant to support the contention that economic impact should be considered. Thus even if this Court were to re-examine *Renton* and *Young*, and consider the appellant's question, the appellant has failed to provide this Court with sufficient evidence on which to grant them favorable relief. The appellant's further contention, that it was error for the Illinois Supreme Court to find that Cook County's ordinance provides a reasonable number of suitable sites, because in appellant's view, land zoned industrial is by definition ill-suited (J.S. 8), is likewise without precedent. By so arguing, appellant is apparently urging this Court to adopt a rule finding industrial land to be *per se* unsuitable as alternative locations for adult businesses. Such a rule however would be legally and factually inconsistent with *Renton* and also contrary to the factual finding of the trial court in this case.

Per se exclusion of industrial zones as alternative locations for sexually oriented businesses would severely impair the ability of local government to tailor solutions to the problems associated with accommodating such businesses, in that industrial zones are often the only zoning districts which are not located in close proximity to residential areas or other family oriented land uses. This Court has stated that cities must be given an opportunity to experiment with solutions to the admittedly serious problems created by adult businesses, and that so long as a reasonable opportunity to open and operate is afforded to such businesses, the First Amendment is satisfied. *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

Cook County's zoning authority over the unincorporated areas of the County necessitates unique consideration of the land use patterns in the many municipalities which comprise the majority of the County. Permitting adult businesses to locate only in industrial areas, provides such businesses with ample opportunities to open and operate, while at the same time buffers the surrounding communities from the adverse secondary effects associated with adult businesses. The facts of this case clearly demonstrate that irrespective of the zoning nomenclature designating areas where sexually oriented adult businesses may locate as "industrial", many sites are available which are not occupied by industry and which are otherwise suitable for establishment of an adult business.

The Illinois Supreme Court held that Cook County has provided adult businesses with reasonable opportunities to open and operate their businesses, and that the County's zoning ordinance is constitutional. That decision is consistent with *Renton*, and should be affirmed.

CONCLUSION

Wherefore, the Appellee moves this Court to affirm the judgment entered in this cause by the Supreme Court of Illinois.

Respectfully submitted,

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